DOCKET

(13)

No. 87-201-ASX
Status: GRANTED

Title: Gerald E. Mansell, Appellant
v.
Gaye (Mansell) Forbes

Docketed:
July 27, 1987

Court: Court of Appeal of California,
Fifth Appellate District

Counsel for appellant: Elia,Jim T., Cone,Douglas B.

Counsel for appellee: Cornell,Dennis A.

NOTE* Notice of Appeal filed 5/29/87

Entry	Date	Note	Proceedings and Orders
1	Jul 27 1987	G	Statement as to jurisdiction filed.
2	Sep 2 1987		DISTRIBUTED. September 28, 1987
3	Sep 11 1987	F	Response requested -- JPS.
5	Nov 13 1987		Brief of appellee Gaye M. Forbes in opposition filed.
6	Nov 18 1987		REDISTRIBUTED. December 4, 1987
7	Dec 7 1987	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
8	Jun 7 1988		REDISTRIBUTED. June 23, 1988
9	Jun 7 1988	X	Brief amicus curiae of United States filed.
10	Jun 27 1988		PROBABLE JURISDICTION NOTED. **********
11	Jul 28 1988	G	Motion of the parties to dispense with printing the joint appendix filed.
13	Aug 5 1988		Order extending time to file brief of appellant on the merits until August 25, 1988.
14	Aug 22 1988		Brief of appellant Gerald E. Mansell filed.
15	Aug 25 1988	G	Motion of Retired Officers Association, et al. for leave to file a brief as amici curiae filed.
16	Sep 8 1988	N	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Sep 13 1988		Order extending time to file brief of appellee on the merits until October 8, 1988.
31	Sep 13 1988	D	Motion of American Retirees Association for leave to file a brief as amicus curiae filed.
19	Sep 15 1988		Motion of the parties to dispense with printing the joint appendix GRANTED.
20	Oct 3 1988		Motion of Retired Officers Association, et al. for leave to file a brief as amici curiae GRANTED.
21	Oct 5 1988		Motion of the Solicitor General to participate in oral argument as amicus curiae and for divided argument WITHDRAWN.
22	Oct 6 1988	G	Motion of the Solicitor General for leave to file a brief as amicus curiae, out-of-time filed.
23	Oct 8 1988		Brief of appellee Gaye M. Forbes filed.
26	Oct 8 1988	G	Motion of Women's Equity Action League, et al. for leave to file a brief as amici curiae filed.
24	Oct 11 1988		DISTRIBUTED. OCTOBER 14, 1988. (Motion of Solicitor General for leave to file a brief as amicus curiae, out-of-time).

No. 87-201-ASX

Entry	Date	Note	Proceedings and Orders
25	Oct 12 1988		Opposition of appellee to motion of the Solicitor General for leave to filed.
27	Oct 17 1988		Motion of the Solicitor General for leave to file a brief as amicus curiae, out-of-time GRANTED.
28	Oct 24 1988		SET FOR ARGUMENT. Tuesday, January 10, 1989. (3rd case) (1 hr.)
29	Oct 31 1988		Motion of Women's Equity Action League, et al. for leave to file a brief as amici curiae GRANTED.
30	Oct 31 1988	D	Motion of Retired Officers Association, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
32	Nov 4 1988		CIRCULATED.
33	Nov 14 1988		Motion of American Retirees Association for leave to file a brief as amicus curiae DENIED.
34	Nov 14 1988		Motion of Retired Officers Association, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
35	Nov 15 1988	X	Brief of appellee in reply to brief for the United States as amicus curiae filed.
36	Dec 13 1988	X	Reply brief of appellant Gerald E. Mansell filed.
38	Jan 10 1989		ARGUED.

JURISDICTIONAL

STATEMENT

87-201

NO. _____

Supreme Court, U.S.
FILED
JUL 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

GERALD E. MANSELL, *Appellant*

vs.

GAYE M. (MANSELL) FORBES, *Appellee*

ON APPEAL FROM THE COURT OF APPEAL
OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED BY THE APPEAL

Whether California's community property division of the Appellant's Veterans' Administration Disability Benefits upon dissolution of marriage violates the direct enactment of 38 U.S.C. §3101 which requires that the disabled veteran actually receive the benefits.

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(d)

OPINIONS DELIVERED IN THE COURTS BELOW

Interlocutory Judgment of Dissolution of Marriage (Clerk's Transcript on Appeal, Pages 3 to 5 [C.T. 3-5], set forth in full in Appendix A). Denial of Appellant's Motion for Modification of Judgment (C.T. 93 [set forth in full in Appendix B]). Denial of Motion for Reconsideration (C.T. 94 [set forth in full in Appendix C]). The California Court of Appeal Opinion (set forth in full in Appendix D). The California Supreme Court denial of Review (set forth in full in Appendix E).

None of the decisions of the courts below are officially reported.

(e)

GROUNDS ON WHICH JURISDICTION IS INVOKED

(i)

NATURE OF THE PROCEEDING

Appellant argued at every level below that the states do not have jurisdiction to divide his Veterans' Administration Disability Benefits as community property because 38 U.S.C. §3101 preempts the state's power to award his disability benefits to his former wife. However, no California court has responded directly to the Appellant's federal preemption argument under 38 U.S.C. §3101. Nevertheless, the courts below have divided the Appellant's disability benefits, giving half of them to his former wife.

(ii)

JUDGMENT SOUGHT TO BE REVIEWED

The opinion of the California Court of Appeal for the Fifth Appellate District (Appendix D), was filed on January 30, 1987.

Review was Denied without Opinion by the California Supreme Court (Appendix E) on April 29, 1987. Notice of Appeal was filed in the California Court of Appeal for the Fifth Appellate District on May 29, 1987 (Appendix F).

This appeal is being docketed within 90 days of the California Supreme Court's denial of the appellant's petition for review.

(iii)

STATUTORY PROVISIONS AND CASES SUSTAINING JURISDICTION

Under the Supremacy Clause, United States Consitution, Article VI, Clause 2, federal law must prevail. However, the California courts have refused to acknowledge that 38 U.S.C. §3101 prevents the states from awarding Veterans' Administration Disability Benefits to former wives as community property, even though this court has held that the exact same language as §3101, as well as other similar federal statutes, absolutely preempts the state power to treat these federal benefits as community property.

The conscious vigor with which the California courts have cast aside the doctrine of federal preemption is vividly demonstrated by the California Supreme Court's reaction to the one Court of Appeal Opinion which followed the federal law. In the case of *In re Marriage of Orr* (1979) [not officially published], 157 Cal. Rptr. 301, the Court of Appeal held that Congress intended Veterans' Administration Disability Benefits to remain the separate property of the disabled spouse. Under the Supremacy Clause, state community property laws had to defer to the specific provisions of the Veterans' Benefits Acts designed to protect those benefits (38 U.S.C. §3101), and wife had no community property interest in the husband's military disability benefits.

Before the *Orr* decision was final for purposes of appeal, the California Supreme Court struck down the Opinion, not by granting a hearing on the merits and ruling on the cause, but by ordering that the opinion not be officially published. The effect of this order is that the case may not be cited by any party to any California Court in any other action, and it cannot be relied on

as precedent by any California court (California Rule of Court 977). In this way the Supreme Court avoided considering the merits of the federal preemption issue without leaving the decision as precedent for other California courts to follow. It demonstrates that the California Supreme Court has consciously determined not to yield to federal preemption in this area, and that the Court is quite willing to prevent the lower state courts from obeying the Supremacy Clause.

This Court's jurisdiction is therefore invoked under 28 U.S.C. §1257 (2), and *Wissner v. Wissner* (1950) 338 U.S. 655; *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572; *McCarty v. McCarty* (1981) 453 U.S. 210; and *Ridgway v. Ridgway* (1981) 454 U.S. 46.

(f)

CONSITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the anti-attachment provisions of the Veterans' Benefits Act, 38 U.S.C. §3101, which is set forth in full in Appendix G. The particular provision of §3101 that is involved is §3101(a), which provides:

> "Payment of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. . ."

This case also involves intepretation of the Uniformed Services Former Spouses Protection Act (FUSFSPA) (Pub. L. 97-252 [10 U.S.C. §1408]), which is set forth in full in Appendix G because of its length. In particular, the case involves §1408 (c)(1) and §1408 (a)(4)(B). Section 1408 (c)(1) provides:

> "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member

> and his spouse in accordance with the law of the jurisdiction of such court." (Emphasis added.)

Section 1408(a) (4) (B) provides:

> "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which —
>
> > "(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts martial, federal employment taxes, and amounts waived in order to receive compensation under Title 5 or Title 38. (Emphasis added.)

Several other federal statutes are involved to the extent that they pheripherally support the Appellant's contentions. They are set forth in full in Appendix G because of their length. These statutes are 38 U.S.C. §§310, 315, 3012, and 3105, 42 U.S.C. §§659(c) and 662, and 45 U.S.C. §231m.

(g)

STATEMENT OF THE CASE

The marriage of the parties was dissolved by an Interlocutory Judgment of Dissolution of Marriage filed May 29, 1979 (Appendix A). Paragraph 6 of the Judgment provides:

> "6. Respondent shall make an allotment to Petitioner in an amount equaling fifty percent (50%) of the gross retirement pay and compensation from the Veterans' Administration accrued through Respondent's employment with the United States Air Force,. . ."

On May 13, 1983, the Appellant filed a motion to modify the judgment by deletion of paragraph 6 (C.T. 40). He argued, inter alia, in his Points and Authorities in support of the motion that under the Supremacy Clause of the United States Constitution, the states were precluded from disposing of Veterans' Administration Disability Benefits by Title 38 U.S.C. §3101 (C.T.41).

Hearing was held on June 29, 1983, and the trial court denied the motion for modification (Appendix B). The trial court also denied Appellant's motion for reconsideration (Appendix C). These denials were not accompanied by a statement of decision outlining why the trial court had rejected the Appellant's arguments.

Appellant then appealed to the California Court of Appeal for the Fifth Appellate District. Once again, he argued that the state courts did not have jurisdiction over Veterans' Administration Disability Benefits because 38 U.S.C. §3101 preempted the state's ability to award Veterans' Administration Disability benefits as community property (Appellant's Opening Brief, pages 7 and 8). The California Court of Appeal rejected Appellant's challenges on January 30, 1987, and affirmed the trial court's decision (Appendix D). The great bulk of the Appellate Court Opinion was devoted to a discussion of this Court's decision in *McCarty v. McCarty* (1981) 453 U.S. 210, and how it was affected by FUSFSPA. The Appellate Court also briefly addressed the other issues raised by the Appellant, with the exception of the preemptive effect of 38 U.S.C. §3101.

The Appellant then sought review in the California Supreme Court. In his Petition for Review he tried to focus the Court's attention on the preemption issue by expressly limiting his argument to the proposition that division of Veterans' Administration Disability Benefits as community property violates 38 U.S.C. §3101. However, the California Supreme Court refused to hear the case, and on April 29, 1987, denied Review. The California Supreme Court did not issue an opinion (Appendix E). Therefore, the Court of Appeal Opinion is the final state action available to the Appellant.

(h)

THE QUESTION OF FEDERAL PREEMPTION IS SUFFICIENTLY SUBSTANTIAL TO WARRANT PLENARY REVIEW BECAUSE CALIFORNIA HAS BLATANTLY REFUSED TO FOLLOW FEDERAL LAW

The Appellant has asserted federal preemption in every forum available to him. However, the California Courts have refused to address the issue. The Appellant contends that the reason why the California courts will not reach this important question is that the

only legally sufficient response is that the states do not have jurisdiction to divide Veterans' Administration Disability Benefits as community property. The current California courts do not like this result, so they refuse to give any answer whatsoever. The one Opinion that did reach the merits of this issue was promptly depublished by the California Supreme Court (*In re Marriage of Orr* [1979] [not officially published], 157 Cal. Rptr. 301).

The Appellant contends that the refusal to recognize the supremacy of federal law is an affront to the settled doctrine of federalism. If this court will not accept the issue, then federal preemption of state law is a meaningless platitude in California.

This Court pointed out, in the case of *Ridgway v. Ridgway,* (1981), 454 U.S. 46, 54-55:

> "Notwithstanding the limited application of federal law in the field of domestic relations generally, (see *McCarty v. McCarty* [453 U.S. 210], 101 S.Ct. 2728, 2735, 69 L.Ed.2nd 589 [1981]; *Hisquierdo v. Hisquierdo* 439 U.S. 572, 581 [1979]; *In re Burrus,* 136 U.S. 586, 593-594 [1890], this court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in federal rights. . .and, specifically, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments."

Preemption by the federal government, quite simply, deprives the state courts of subject matter jurisdiction and this has been so from the earliest days of our country. In *McCulloch v. Maryland* [1818] 4 Wheat 316, Chief Justice Marshall construed the Supremacy Clause as the bulwark of national power when he declared:

> "The states have no power by taxation or otherwise, to retard, impede, burden, or any manner control the operation of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government." (4 Wheat at 463).

Five years later, Chief Justice Marshall, in the case of *Gibbons v. Ogden* (1824) 9 Wheat, 6 L.Ed. 23, said: "The nullity of any act,

inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law." (9 Wheat at 210).

Ever since *McCulloch* and *Gibbons,* if a state action is seen to be incompatible with any legitimate exercise of power by the federal government, it loses all claim of validity — and this is true even though the state action in question was taken within a sphere in which the states could otherwise act (*Free v. Bland* [1962] 369 U.S. 663; *Wissner v. Wissner* [1950] 338 U.S. 655). However, if state courts can merely ignore federal law, then preemption is meaningless.

This Court has, on many previous occasions, considered conflicts between federal law and state community property laws, and each time resolved the conflict in favor of federal preemption (*Yiatchos v. Yiatchos* [1964] 376 U.S. 306; *Wissner v. Wissner* [1950] 338 U.S. 655; *McCune v. Essig [1905] 199 U.S. 382; Hisquierdo v. Hisquierdo* [1979] 439 U.S. 572; and others). The Supremacy Clause requires this result.

Appellant's contentions do not depend upon *McCarty v. McCarty* (1981) 453 U.S. 210. The *McCarty* court did not accord retired servicemen any special rights; that decision only recognized rights which Congress had granted to retired servicemen in federal statutes at the beginning of relevant time.

Congress responded to *McCarty* with FUSFSPA, infra. However, Appellant contends that Congress did not give California the unlimited right to treat military retirement pay in accordance with its general community property laws. It merely provided for division of "disposable retired pay," as opposed to gross retired pay. However, California courts have rejected this analysis on the ground that FUSFSPA is only a garnishment statute, and does not limit the state's power to characterize federal benefits (*Casas v. Thompson* [1986] 42 Cal. 3d 131). This reason alone is sufficient to reverse the judgment below.

The fact that California courts seem to feel that Congress should have allowed the states to divide all of the retired servicemen's benefits is of no moment. As this Court pointed out in *Ridgway v. Ridgway* (1981) 454 U.S. 46, 54-55, quoting from *U.S. v. Yazel* (1966) 382 U.S. 341, 352:

"[t]he relative importance to the state of its own law is not

material when there is a conflict with a valid federal law, for the framers of our constitution provided that the federal law must prevail." (*Free v. Bland* [1962] 369 U.S. 663, 666; *Gibbons v. Ogden* [1824] 9 Wheat. 1, 210-211).

What is important in the present case is the meaning and effect of FUSFSPA and its relationship with the anti-attachment provisions of 38 U.S.C. §3101. The Uniformed Services Former Spouses Protection Act (FUSFSPA) (Pub.L. 97-252 [10 U.S.C. §1408]) fully supports Appellant's contention that Veterans' Administration Disability Benefits may not be divided as community property. Section 1408(c)(1) provides:

"Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (Emphasis added.)

There can be no doubt that Congress granted the states a limited right to divide "disposable retired pay." However, Section (a)(4) of the Act removes any ambiguity as to the meaning of "disposable" by expressly defining what the state courts may divide. That section provides:

"'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled less amounts which —

"(A) are owed by that member to the United States;

"(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by the courts martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38." (Emphasis added.)

There is no ambiguity whatsoever in section 1408(a)(4). Congress unequivocally stated, and intended to exclude from division by the state courts those "amounts waived in order to receive compensation under. . .title 38."

Chapter 11 of Title 38, section 310, of the United States Code provides for compensation for a disability contracted in the line

of duty or for an aggravation of pre-existing injury or disease. In the present case, the husband was granted disability benefits under Title 38 of the United States Code and was required to waive a portion of his military longevity retirement in order to receive Veterans' Administration benefits (38 U.S.C. §3105). Since there is no ambiguity in section 1408(a) (4)(B) of Title 10, the amount that the husband receives as Veterans' Administration benefits must be subtracted from the total retirement pay before the state can divide the remaining "disposable retired pay." However, California refuses to consider Appellant's claim.

Rather than following the new federal statute, California courts have insisted on following old state precedents which have been nullified by this Court. In the case of *In re Marriage of Stenquist* (1978) 21 Cal.3d 779, the issue was whether a community interest existed in a disabled serviceman's retirement compensation calculated on the basis of rank, longevity of service, and disability. The court concluded that the amount of compensation, insofar as it merely replaced ordinary retirement compensation, was a community asset divisible upon dissolution, and that only the excess amount of compensation above the amount he would have received as a retirement pension without disability could be properly characterized as the serviceman's separate property (*Stenquist, supra.*, at 782-789, citing *In re Marriage of Fithian* [1974] 10 Cal.3d 592, 604). The Court of Appeal followed this reasoning in the present case, without considering the argument under 38 U.S.C. §3101.

However, *Stenquist* is not the latest word on community interest in federal benefits. This Court, in the case of *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, effectively nullified *Stenquist*. The *Hisquierdo* analysis specifically refers to California's Supreme Court ruling that California's community property laws apply to retirement benefits payable under the Railroad Retirement Act, and held that no community interest attached to an employee's benefit payable under the Act. In finding federal preemption in the allocation of a federal entitlement, the Court put primary emphasis upon the Act's anti-attachment provision (45 U.S.C. §231m.). "The critical terms here," the court said, "include a specified beneficiary protected by a flat prohibition against attachment and anticipation." (*Hisquierdo, supra.* at 584).

The court also noted that while Congress amended the Social Security Act in 1975 to create an exemption to this and similiar

federal anti-attachment statutes for child support and alimony (42 U.S.C. §659), a further amendment in 1977 specifically excluded any community property division from the definition of alimony (42 U.S.C. §662[c]). The court concluded that the purpose of §231m was to insure that retirement benefits actually reach the employee beneficiary and that state laws which interfere with this result must, under the Supremacy Clause, defer to federal allocation of benefits (U.S. Const., Art. VI, cl. 2; see also *Wissner v. Wissner* [1950] 338 U.S. 655).

Hisquierdo is directly relevant to the issue in the present case — whether Veterans' Administration disability benefits are community or separate property — because of the similiarity between the anti-attachment statutes for railroad employees and for veterans. In the present case, the husband was eligible for a retirement pension. However, he was forced to waive a portion of his retirement pension in order to receive disability compensation from the Veterans' Administration under the provisions of the Veterans' Benefits Acts (38 U.S.C. §3105). The monthly benefit paid to him by the Veterans' Administration is a flat sum determined on the basis of percentage of disability and unemployability, which in his case is forty percent (40%) (C.T. 50).

As a recipient of Veterans' Administration benefits, the Appellant is fully protected by the anti-attachment provisions of the Veterans' Benefits Acts (38 U.S.C. §3101), which shields disability benefits from legal process in language at least as strong as that used in section 231m of the Railroad Retirement Act. Section 3101 states:

> "Payment of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. . ." (Emphasis added.)

Identical language was involved in the case of *Wisssner v. Wissner* (1950) 338 U.S. 655, and this Court held that the language prevented the state from applying community property law to

reach the federal benefits. In *Wissner, supra.*, 338 U.S. at 659, the Court invoked the identical anti-attachment provision as an independent ground for reversing the state court community property holding. The state court's attempt to limit the anti-attachment provisions because of equitable interests violates the unqualified sweep of the statute. In addition to exempting the proceeds "from the claims of creditors," it also prohibited, in the broadest of terms, any "attachment, levy, or seizure by or under any legal or equitable process whatsoever," whether accomplished "either before or after receipt by the beneficiary." The California courts may be relying upon some perceived equitable consideration. However, this does not excuse their refusal to rule on the merits.

In addition, while the Social Security Act (42 U.S.C. §659) allows attachment of Veterans' Administration benefits to enforce alimony and child support obligations when such benefits are paid to a former serviceman who has waived a portion of his retirement pay in order to receive Veterans' Administration compensation (42 U.S.C. §662[f][2], this provision does not apply to community property obligations. The statute declares that alimony

> ". . .does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." (42 U.S.C. §662[c]).

The conclusion that Congress intended the disabled veteran to be the sole beneficiary of Veterans' Administration disability benefits finds added support in the provision by Congress for a separate benefit for a veterans' dependent spouse (38 U.S.C. §315), a benefit which terminates on the last day of the calendar month in which an annulment or divorce occurs (38 U.S.C. §3012[b][2]). In construing a similar provision in the Railroad Retirement Act, this court in *Hisquierdo* noted that Congress had incorporated a limited community property concept in its scheme for allocation of benefits, but had purposefully abandoned this concept in terminating spousal benefits upon divorce (*Hisquierdo, supra.*, at 582).

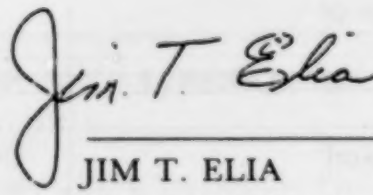
Congress could have provided for recognition upon dissolution of marriage of a serviceman's spouse's community interest in disability pay if it had chosen to do so. This Court pointed out

that, in 1978, Congress enacted special legislation permitting garnishment of Civil Service retirement benefits for community property purposes (*Hisquierdo, supra.*, 439 U.S. at 590). However, Congress, presumably for good and sufficient reasons, has enacted no comparable provision for benefits payable by the Veterans' Administration. Until Congress chooses to act, its present anti-attachment policy is controlling, and the California courts should not be allowed to flaunt the federal law by simply ignoring it.

CONCLUSION

Congress clearly intended Veterans' Administration disability benefits to remain the separate property of the disabled veteran. Under the Supremacy Clause, California's community property laws must defer to the specific provisions of the Veterans' Benefits Acts (38 U.S.C. §3101) designed to protect those benefits. California's refusal to recognize the law is not just an insult to this Court; it is also a serious challenge to our system of federalism. Therefore, this Court should note probable jurisdiction to review California's refusal to recognize federal law.

Respectfully submitted,



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APPENDIX A

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FILED
May 29, 1979
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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MERCED

In re the marriage of

Petitioner: GAYE M. MANSELL

and

Respondent: GERALD E. MANSELL

No. 55594

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

This proceedings was heard on May 29, 1979 before the Honorable George C. Barrett, Department Number Three. The court acquired jurisdiction of the respondent on June 15, 1977 by:

☒ Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceedings, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

THE COURT ALSO ORDERS that:

1. All of the provisions of the Property Settlement Agreement executed by the parties on May 25, 1979, are ratified, confirmed and approved, and the agreement is attached hereto, made a part of, and incorporated into this judgment by reference, as if set forth verbatim, and each of the parties is ordered to comply with all of the terms and provisions of the agreement.

2. Respondent shall have the exclusive care, custody and control of the minor child of the parties, namely, BERNADETTE, born on October 27, 1964.

3. Petitioner shall have the right to visit the minor child at reasonable times and places upon the giving of reasonable notice to the Respondent.

4. Neither party shall pay the other any money or property as and for the support, care and maintenance of the minor child of the parties, but the issue of payment of such support is expressly reserved by the Court.

5. Petitioner shall receive no money or property from Respondent as and for spousal support as she has waived her right to receive such support.

6. Respondent shall make an allotment to Petitioner in an amount equalling fifty percent (50%) of the gross retirement pay and compensation from the Veterans' Administration accrued through Respondent's employment with the United States Air Force, and shall increase such allotment from time to time in an amount necessary to equal fifty percent (50%) of the gross amount of any and all increases in such retirement pay and compensation from the Veterans' Administration that may occur in the future until death of either party.

7. Jurisdiction over the distribution of Petitioner's share of the retirement pay and compensation from the Veterans' Administration accrued through Respondent's employment with the United States Air Force is expressly reserved by the Court.

8. Each party shall pay his own attorneys fees and costs in an amount agreed upon between each of them and his respective attorney.

9. A Final Judgment of Dissolution of Marriage may be entered forthwith upon the filing of appropriate documents by either party as each party has waived his rights to findings of fact and conclusions of law, to move for a new trial, and to appeal this judgment.

DATED: May 29, 1979

/s/ GEORGE C. BARRETT
JUDGE OF THE SUPERIOR COURT

APPENDIX B

Law Office of
T.N. PETERSEN
Shaffer Buildling
1724 'M' Street
Merced, California 95340
(209) 722-3826

FILED
August 10, 1983
Kenneth L. Randol
Merced County Clerk
Marion Harmon, Deputy

Attorney for Respondent

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MERCED

No. 55594

GAYE M. MANSELL: Petitioner

and

GERALD E. MANSELL: Respondent

ORDER DENYING MOTION FOR MODIFICATION OF INTERLOCUTORY AND FINAL JUDGMENTS OF DISSOLUTION

This matter came on regularly for hearing on June 29, 1983 before the Honorable Robert M. Falasco, Judge of the Superior Court, on Respondent's Motion For Modification of Interlocutory and Final Judgments of Dissolution.

Petitioner was present in person and by her attorney Dennis Cornell and defendant was present in person and with his attorney T.N. Pettersen.

The Court having heard and considered the arguments of the attorneys for the parties; and good cause appearing therefore, IT IS HEREBY ORDERED that respondent's Motion For Reconsideration be, and the same is, hereby denied.

DATED: August 10, 1983

/s/ ROBERT M. FALASCO

HONORABLE ROBERT M. FALASCO
JUDGE OF THE SUPERIOR COURT

APPENDIX C

Law Office of
T.N. PETERSEN
Shaffer Buildling
1724 'M' Street
Merced, California 95340
(209) 722-3826

FILED
August 10, 1983
Kenneth L. Randol
Merced County Clerk
Marion Harmon, Deputy

Attorney for Respondent

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MERCED

GAYE M. MANSELL: Petitioner and GERALD E. MANSELL: Respondent	No. 55594 ORDER DENYING MOTION FOR RECONSIDERATION

This matter came on regularly for hearing on August 1, 1983 on Respondent's Motion For Reconsideration of the matters previously heard herein on June 29, 1983 before the Honorable Robert M. Falasco, Judge of the Superior Court.

Petitioner appeared in person with her attorney Dennis Cornell and Respondent appeared in person with his attorney T.N. Petersen.

The Court having heard and considered the arguments of the attorneys for the parties; and good cause appearing therefore, IT IS HEREBY ORDERED that Respondent's Motion For Reconsideration be, and the same is, hereby denied.

DATED: August 10, 1983

/s/ ROBERT M. FALASCO

HONORABLE ROBERT M. FALASCO
JUDGE OF THE SUPERIOR COURT

APPENDIX D

FILED
January 30, 1987
Kevin A. Swanson, Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the marriage of Gaye M. and Gerald E. Mansell
GAYE M. MANSELL Plaintiff and Respondent v. GERALD E. MANSELL Defendant and Appellant

5 Civil No. F002872

(Super. Ct. No. 55594)

OPINION

WOOLPERT, Acting Justice

On May 25, 1979, Gerald Mansell and Gaye Mansell executed a property settlement agreement in conjunction with dissolution proceedings taking place at the same time. Although the parties

have been divorced since 1979, for purposes of convenience in this opinion, they will be referred to as Husband and Wife, respectively. On May 29, 1979, the Merced County Superior Court ordered entry of an interlocutory judgment of dissolution of marriage. The property settlement agreement was incorporated into the interlocutory judgment. Final judgment of dissolution was entered on June 4, 1979.

Present counsel for Husband was substituted in on May 13, 1983. Around this same time, Husband filed the motion for an order modifyng the interlocutory and final decrees. Wife opposed the motion, and the motion was later denied by the court. Husband's motion for reconsideration was also denied.

FACTS

The parties were married on July 24, 1954. There are six children by the marriage. The couple separated on May 15, 1977. As noted, a property settlement agreement was entered into in 1979 which was incorporated into the 1979 interlocutory judgment of dissolution of marriage. The record indicates Husband, a former serviceman eligible for air force retirement, filed a claim for disability with the Veterans Administration at least as early as July 13, 1977. Payments were to commence January 1, 1977, in the event Husband chose to waive a portion of his retirement pay and elected, instead, to receive Veterans Administration compensation for his disability. There is further evidence indicating he made such an election. The property settlement agreement stated all property listed on two schedules attached to the agreement was community property. Husband's retirement pay and Veterans Administration compensation was listed on these schedules and according to the schedules, each owned one-half interest in the pay and benefits.

The property settlement agreement contains the following provisions dealing with Husband's military retirement:

> "6. Respondent [Husband] shall make an allotment to Petitioner [Wife] in an amount equalling fifty percent (50%) of the gross retirement pay and compensation from the Veterans' Administration accrued through Respondent's employment with the United States Air Force, and shall increase such allotment from time to time in an amount necessary to equal fifty percent (50%) of the gross amount of any and all increases in such retirement pay and compensation from the Veterans' Administrtion that may occur in the future until the death of either party."

Husband's motion to modify the interlocutory judgment, as well as his motion to reconsider denial of his motion to modify, dealt with the above provision. In each case, he sought to have the provision deleted from the interlocutory judgment.

INTRODUCTION

At the time the interlocutory judgment was entered in this case, California law was settled on the question of the character of military retirement and disability pay. On the question of retirement pay, our Supreme Court had stated:

> "The law is settled in California that retirement benefits which flow from the employment relationship, to the extent they have vested, are community property subject to equal division between the spouses in the event the marriage is dissolved. [Citations.] Underlying the community treatment of retirement benefits is the concept that they do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee. Thus whether an employee is required to make contributions to the retirement fund is irrelevant to the ultimate characterization of the benefits as community property. [Citations.] Furthermore, the principle that retirement benefits are community property has been held to apply whether the source of the retirement fund lies in a state, federal, military, or private employment relationship. [Citations.]" (*In re Marriage of Fithian* (1974) 10 Cal.3d 592, 596, fn. omitted)

In *Fithian,* the court also addressed the question of the character of military disability pay when an election, as in the present case, had been made to receive compensation in disability form rather than as retirement pay:

> "Under federal law a disabled serviceman may waive his retirement pay and instead receive a pension from the Veterans Administration. (38 U.S.C. §3105.) Because

some federal cases have referred to pension benefits as gratuities, Husband contends such benefits must be the separate property of the serviceman, and therefore retirement pay must be so characterized as well. While it would indeed be inconsistent with community property law to allow the Husband to transmute community property into his own separate property, pensions are not considered gratuities under California law and are classed as community property for precisely the same reasons that retirement benefits are community property. [Citations.] Thus, a disabled serviceman's option to receive a pension instead of retirement pay has no relevance to the issue whether the states may treat either type of benefit as community property.'' (*Id.* at p. 602, fn. omitted; see also *In re Marriage of Milhan* (1980) 27 Cal.3d 765.)

Approximately seven years after *Fithian,* the United States Supreme Court held in *McCarty v. McCarty* (1981) 453 U.S. 210, that state courts were impliedly preempted by the federal statutory scheme from dividing military *retirement* pay. (Id. at pp. 213, 231-236.)

The *McCarty* case began in the state courts of California where it was found the former Husband's retirement pay was community property. (*Id.* at pp. 217-219.) Nevertheless, the United States Supreme Court made two additional points in *McCarty* which are important to the present case.

First, the court stated:

> ''This Court repeatedly has recognized that '''[t]he whole subject of the domestic relations of husband and wife. . .belongs to the laws of the States and not to the laws of the United States.''' [Citation.] Thus, '[s]tate family and family-property law must do ''major damage'' to ''clear and substantial'' federal interests before the Supremacy Clause will demand that state law be overridden.'''(*Id.* at p. 220.)

Second, the court stated:

> ''Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member.

> This decision, however, is for Congress alone. We very recently have re-emphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs. [Citation.] Thus, the conclusion that we reached in *Hisquierdo* follows *a fortiori* here: Congress has weighed the matter, and '[i]t is not the province of state courts to strike a balance different from the one Congress has struck.' [Citation.]'' (*Id.* at pp. 235-236.)

Since *McCarty* was decided, Congress did exactly that: the ''federal legislative scheme'' which deals with the retirement pay and disability compensation involved in the present case (10 U.S.C. §1408 [FUSFSPA] has been drafted and amended. (See 10 West's Annot. U.S.C. (1983) §1408, p. 192; *id.* at pocket pt. p. 18.)

The most pertinent parts of section 1408 to the issues on appeal provide:

> ''(4) 'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which —
>
> ''(A) are owed by that member to the United States;
>
> ''(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;
>
> ''(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;
>
> ''(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

"(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

"(F) are deducted because of an election under Chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section." (10 U.S.C. §1408, subsec.(a)(4).)

"(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (10 U.S.C. §1408, subsec. (c)(1).)

The interlocutory judgment in the present action was filed before *McCarty*. The motion to modify was filed after *McCarty* and after enactment of FUSFSPA.

Only recently, and sometime after briefs were filed in the present case, our high court interpreted the impact of the FUSFSPA legislation and the *McCarty* decision on California community property law. (*Casas v. Thompson* (1986) 42 Cal.3d 131) The *Casas* opinion will be discussed with the issues on appeal to which it applies.

I. APPEAL TAKEN FROM ORDER DENYING MODIFICIATION OF A JUDGMENT?

Wife argues no appeal may be taken from an order denying modification of a judgment since the essence of such a result would be to allow Husband to appeal twice from the same judgment: The appeal should have been taken from the judgment or order itself. (Citing 4 Cal.Jur.3d, Appellate Review, §51, pp.88-89.)

However, viewed as a motion to vacate the original judgment and enter a different one, denial of the motion is appealable since appeal lies from the original judgment. (*Adams & Sevitich,* II Cal. Family L. Practice (7th ed. 1980) Setting Aside Family Law

Judgments, S. 47; Code Civ. Proc, §904.1, subds. (a), (b)(i).) The postjudgment order also relates to enforcement of the judgment, inasmuch as the court specifically retained jurisdiction over the retirement and disability benefits, presumably to oversee enforcement and pay judgments (see *In re Marriage of Justice* (1984) 157 Cal.App.3d 82, 86, fn. 4.):

"7. Jursidiction over the distribution of Petitioner's share of the retirement pay and compensation from the Veterans' Administration accrued through Respondent's employment with the United States Air Force is expressly reserved by the court."

Wife argues Husband has waived all rights to appeal because a stipulation contained in the original interlocutory judgment provided as follows:

"9. A Final Judgment of Dissolution of Marriage may be entered forthwith upon the filing of appropriate documents by either party as each party has waived his rights to findings of fact and conclusions of law to move for a new trial, and to appeal this judgment."

In support of this argument, Wife cites *In re Marriage of Mahone* (1981) 123 Cal.App.3d 17, a case also involving air force retirement benefits. (*Id.* at p. 21.) Both parties appealed. The former Husband to the marriage challenged the finding his air force retirement was community property. A stipulation was entered into by the parties which stated the retirement pay was community property and the court found accordingly. Subsequent to entry of judgment, the *McCarty* decision was handed down by the United States Supreme Court; FUSFSPA had not yet been enacted.

Nevertheless, the *Mahone* court made the following observations regarding the stipulation:

"Husband contends that federal legislation establishing the retirement scheme for the military preempts the application of a state's community property law to the retirement pay of military personnel. The United States Supreme Court recently held so. [Citations.]

"It does not follow, however, that husband should be relieved of the trial stipulation by reason of the *McCarty* decision. The written stipulation was filed with the trial

court January 5, 1978. As of that date it was settled California law that a federal military retirement pension was subject to division as community property, and the United States Supreme Court had not indicated to the contrary. [Citation.] The stipulation was in accordance with the law as it then stood, and husband is not entitled to relief from the stipulation merely because the law was subsequently changed by judicial decision. [Citations.]" (*Id.* at pp. 21-22.)

The parties in *Mahone* appealed from what the court quoted as being a "'Further Judgment on Reserved Issues After Bifurcation and Final Judgment of Dissolution of Marriage.'" (*Id.* at p. 21.) The present case is distinguishable from *Mahone.* Husband appeals, not from the original interlocutory judgment of dissolution, but from a later order denying modification of that judgment. The waiver entered into by the parties does not change the "appealable" character of the judgment, it only precludes the parties to the agreement from taking an appeal from the judgment itself. No restrictions involving appeals from subsequent judgments on motions to modify the judgment were stipulated to or agreed upon by the parties. This court must therefore reach the merits of the appeal in this case.

II. SUPERIOR COURT JURISDICTION

Husband argues the superior court did not have jurisdiction over the subject matter of the retirement pay or disability benefits. In support of this argument, Husband cites *In re Marriage of Costo* (1984) 156 Cal.App.3d. 781. In *Costo,* the court held that the state trial court had no jurisdiction over that portion of compensation pay the former serviceman received as a result of electing to waive retirement pay in order to receive disability benefits. (*Id.* at pp. 782, 786, discussing 10 U.S.C. §1408, subsec. (a)(4).)

Under the *Costo* reasoning, "disposable retired or retainer pay" over which state courts have jurisdiction is pay which first has deducted from it the amount received as disability compensation after a waiver election pursuant to title 38 of the United States Code. (*Id.* at p. 786.) Federal preemption therefore applies to the disability portion of the compensation. In so doing, the *Costo* court disagreed

with two post-FUSFSPA decisions by other districts (*Id.* at p. 787 & fn. ll; see *In re Marriage of Cullen* (1983) 145 Cal.App.3d 424; *In re Marriage of Stenquist* (Stenquist II) (1983) 145 Cal.App.3d 430.)

The reasoning of *Costo* was criticized in *Casas.* (*Casas v. Thompson, supra,* 42 Cal.3d 131, 144-145.) The former serviceman in *Casas* adopted reasoning similar to that of the *Costo* court. (*Id.* at p. 144.) The Supreme Court first noted that the United States Supreme Court in *McCarty* had found state community property laws were impliedly preempted with regard to military pensions due to conflicts between state and federal law, and the general federal statutory scheme dealing with the area of military pensions. (*Id.* at p. 145.) Since the case before the state high court was both post *McCarty* and post-FUSFSPA, the issue was phrased as follows:

"The *McCarty* holding of implied preemption is thus a contextual one, taking into account all relevant facts and circumstances. Those facts and circumstances have now changed by reason of Congress's enactment of FUSFSPA. Accordingly, the question we must address here is not whether FUSFSPA expressly grants to the states the power to divide the gross amount of military pensions, but whether under the present federal scheme there remains a conflict between the federal retirement statutes and California community property rights threatening clear and substantial federal interests with grave harm. Stated differently, were *McCarty* to be decided after FUSFSPA, would the Supreme Court imply preemption?" (*Ibid.*)

After a complete analysis of the issue, the court concluded:

"Thus, each of *McCarty's* factual predicates for finding implied preemption disappeared when FUSFSPA was enacted." (*Id.* at p. 147.)

The court went on to the next step of its analysis:

"Even if the present federal statutory scheme governing military retirement does not impliedly preempt, in a general sense, the application of California community property laws in total, it remains to be determined whether any specific provision of FUSFSPA expressly requires a limited change in pre-*McCarty* Californi practice." (*Id.* at p. 147.)

Like Husband, the former serviceman in *Casas* argued FUSFSPA, at minimum, expressly prohibited state courts from dividing that portion of the retirement pay the former service person elected to receive as disability compensation. Again, reliance was placed upon the earlier quoted language contained in 10 U.S.C. section 1408, subsections (a)(4) and (c)(1). (*Casas v. Thompson, supra,* 42 Cal.3d at pp. 147-148.) Subsection (c)(1), it was argued, limited divisability by state courts to disposable pay, which is defined as retirement pay remaining *after* the disability waiver election is taken out.

The court responded by reemphasizing the pre-*McCarty* position taken by the courts of this state:

> "A military pension is characterized as marital property to the extent acquired during the marriage because it is viewed as deferred compensation. (See *In re Marriage of Fithian, supra,* 10 Cal.3d 592, 596.) That compensation was earned by the community during the marriage and, once the pension vests, becomes the 'property' of the community in the generic sense. The concept of 'disposable' pay or income has nothing to do with the characterization of an asset." (*Casas, supra,* at p. 148.)

According to the state Supreme Court, the limitations in subsection (c)(1) refer to the amount of pay which may be attached or garnished. (*Id.* at pp. 148-156.)

The court concluded as follows:

> "In sum, considering its intent and operation, we find FUSFSPA is not consisitent with a division of gross, rather than disposable, military retired pay. FUSFSPA's intended limitations reach only restrictions on the garnishment of and direct payment from the retiree's disposable pay. Characterization of retirement pay remains a state law question. Thus, in California the military retiree's gross pay is a community asset subject to equal division." (*Id.* at p. 151, fn. omitted.)

We are therefore compelled to conclude the court below had jurisdiction over Husband's retirement pay *and* his disability compensation prior to *McCarty* and, with the enactment of FUSFSPA, after the *McCarty* decision as well. A similar conclusion

was reached in *In re Marriage of Daniels* (1986) 186 Cal.App.3d 1084, 1088, and *In re Marriage of Stephens* (1986) 184 Cal.App.3d 616. The *Daniels* court found no preemption under FUSFSPA of the state court's authority to treat a disability pension paid pursuant to title 38 elections as a community property asset.

Other courts have had no hesitancy in applying FUSFSPA retroactively. As one court noted, in addressing the question of retroactive application of *McCarty:*

> "[R]etroactivity is now a moot issue because *McCarty* is no longer the law. On February 1, 1983, the Uniformed Services Former Spouses' Protection Act (Pub.L. No. 97-252), an amendment to title 10 of the United States Code, became effective. The act overrules *McCarty,* stating a 'court may treat disposable retired or retainer pay payable to a member for pay periods beginnning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.' (10 U.S.C. §1048(c)(1). California law treating military retirement pensions as community property is no longer preempted. The act's legislative history clearly indicates Congress' intent to abrogate all applications of the *McCarty* decision (see J. Explanatory Statement of the Com. of Conf. on Pub. L. No. 97-252 from House Conf. Rep. No. 97-749, Aug. 16, 1982, pp. 166-168, 128 Cong. Rec. (1982))." (*In re Marriage of Buikema* (1983) 139 Cal.App.3d 689, 691; accord, *Casas v. Thompson, supra,* 42 Cal.3d at pp. 140-141 & fn. 3; *In re Marriage of Daniels, supra,* 186 Cal.App.3d 1084; *In re Marriage of Frederick* (1983) 141 Cal.App.3d. 876, 880; *Aloy v. Mosh* (1985) 38 Cal.3d 413, 421-422.)

III. MUTUAL MISTAKE OF LAW

Husband argues the court should have allowed deletion of that portion of the property settlement agreement dealing with his retirement disability pay under the principles governing mutual mistake of law. In his declaration in support of the motion to modify, Husband stated he and respondent entered the agreement upon an erroneous mutual mistake of law shared by his counsel at the time.

The mistake involved the law surrounding distribution of Veterans Administration disability pensions and air force retirement benefits. As the *Casas* case demonstrates, the court was well within established principles of California community property law when if found these pensions and benefits to be a community property asset and thereby subject to equal division. No relevant mutual mistake of law has been shown.

IV. THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

It is further alleged on appeal that retroactive application of FUSFSPA violates the Fifth and Fourteenth Amendments. Husband argues the retirement disability benefits are his separate property, and are being taken without just compensation. He also argues retroactive application of FUSFSPA results in the law being applied in an unreasonable, arbitrary and capricious manner.

To the extent these claims are based upon the theory that such pay or benefits are reduced pay for reduced current services, the arguments must fail. The essence of the argument is that the former serviceman performs the services currently (after divorce or separation), yet has his compensation for these services arbitrarily given to his former spouse after divorce, etc. In Casas, a similar argument was made and rejected. The court responded as follows:

> "On a similar note, Max also asserts that division of his military retirement pay is prohibited, because it is reduced compensation for reduced current services and, to the extent earned after his separation from Virginia, is not community property. However, in *In re Marriage of Fithian, supra,* 10 Cal.3d at page 604, we held 'military retirement pay must be realistically viewed as compensation for past, not present, services.' The Supreme Court in *McCarty* did not overrule *Fithian's* characterization of military retired pay as deferred compensation. See *McCarty v. McCarty, supra,* 453 U.S. at p. 223 [69 L.Ed.2d at p. 600].)" (*Casas v. Thompson, supra,* 42 Cal.3d at p. 142, fn. 5.).

Husband additionally argues under the Fifth Amendment prong of his attack that Congress somehow breached its promise to him and other servicemen by passing FUSFSPA; however, this

argument is unsupported by any fact or legal analysis in the record or the briefs.

Under his Fourteenth Amendment attack, Husband argues unequal treatment of similarly situated individuals occurs through retroactive application of FUSFSPA. He cites examples of individuals who are clearly *not* similarly situated. He is apparently concerned that application of the law of different states to individuals otherwise similarly situated (but for coming under the jurisdiction of a different state) will result in those individuals being treated differently. Yet this has always been the case in family law where property division takes place.

As noted earlier, the Supreme Court in *McCarty* emphasized the fact that such matters were traditionally the subject of state law. In *In re Marriage of Fairfull* (1984) 161 Cal.App.3d 532, 536, the court found no violation of due process, equal protection, or separation of powers due to retroactive application of FUSFSPA. The court also found the question of retroactive application to be clearly answered by the express intent of the Congress that the act be so applied. A similar result was reached in *In re Marriage of Ankenman* (1983) 142 Cal.App.3d 833, 838, in which the court found no due process violation through retroactive application.

V. FEDERAL JURISDICATION

Husband last argues Congress has violated article III of the United States Constitution by granting to state courts, pursuant to FUSFSPA, authority over entitlements which are exclusively within the jurisdiction of the federal judiciary pursuant to article III. The argument suggests that state courts have no jurisdiction to adjudicate federal statutory provisions. Further, Husband again relies upon the "current pay for current services" argument rejected by our state high court in *Casas*.

The article III argument must fail. It is not required that an article III judge preside over every case in which a charge, claim, or defense is based upon federal legislation. (*Palmore v. United States* (1973) 411 U.S. 389, 400.) Congress made clear its intent to allow division of military retirement pay and Veterans Administration benefits by state courts. (10 U.S.C. 1408, subsec. (c)(1); see also *In re Marriage of Sarles* (1983) 143 Cal.3d 24, 29-30.) The separation of powers argument was also rejected by the court in *Fairfull*.

The judgment is affirmed with appellate costs to respondent.

/s/ WOOLPERT
WOOLPERT Acting P.J.

WE CONCUR:

/s/ HAMLIN
HAMLIN J.

/s/ BALLANTYNE
BALLANTYNE J.

APPENDIX E:

Supreme Court
FILED
April 29, 1987
Laurence P. Gill, Clerk

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

5th District, No. F002872
S000361

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

IN RE MARRIAGE OF MANSELL

MANSELL, Respondent,
v.
MANSELL, Appellant

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX F

GERALD E. MANSELL
665 Dennis Court
Merced, California 95340
(209) 723-6218

FILED
May 29, 1979
Kevin A. Swanson, Clerk

In Propria Persona

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re the marriage of Gaye M. and Gerald E. Mansell	
GAYE M. (MANSELL) FORBES, Plaintiff and Respondent, vs. GERALD E. MANSELL, Respondent and Appellant	No. 5 Civil No. F002872 (Merced Super. Ct. No. 55594)

NOTICE IS HEREBY GIVEN that GERALD E. MANSELL, the respondent in the state trial court and appellant herein, hereby appeals to the Supreme Court of the United States from the final

judgment of State Supreme Court denying review of the opinion of the Court of Appeal of the State of California in and for the Fifth Appellate District, entered in this action on April 29, 1987.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

Dated: May 28, 1987

/s/ GERALD E. MANSELL
GERALD E. MANSELL
In propria persona

AFFIDAVIT OF SERVICE-SERVICE BY MAIL
(S. Ct. Title 33[3][c])

State of California)
) ss.
County of Merced)

I, LINDA L. MANSELL , depose and say that I am over the age of eighteen and not a party to the within-entitled action, and that on May 28 , 1987, pursuant to Rule 33, Rules of the Supreme Court, I served one copy of the attached NOTICE OF APPEAL on each of the parties required to be served herein by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully paid, in the United States mail at 2334 M Street, Merced, California, addressed as follows:

Clerk, California Supreme Court
4250 State Building
San Francisco, California 94102

Clerk, Merced Superior Court
2222 M Street
Merced, California 95340

Dennis A. Cornell
ALLEN, CORNELL, POLGAR & PROIETTI
Post Office Box 2184
Merced, California 95344

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on May 28, 1987, at Merced, California.

LINDA L. MANSELL /s/ LINDA L. MANSELL

APPENDIX G:

TEXTS OF CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article VI,
Clause 2, Supreme Law of Land

The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

TITLE 10 U.S.C.

§1408. Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) "Court" means —

(A) any court of competent jurisdiction of any State, the Dist. of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—

(A) is issued in accordance with the laws of the jurisdiction of the court;

(B) provides for —

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662 (b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals, under the laws applicable to such appeals or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which —

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which support such withholding:

(E) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before that date of a court order, was married to that member.

(b) For the purposes of this section —

(1) service of a court order is effective if —

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt is requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identifying the member concerned and include, if possible, the social security number of such member; and

(D) the court order of other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is a regular on its face if the order —

(A) is issued by a court of competen; jurisdiction,

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned or transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisidiction of the court, or (C) his consent to the jurisdiction of the court.

(d)(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired or retainer pay of the member shall be used to satisfy (subject to the

limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall —

(i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by and such conflicting court order, but not more than the amount of disposable retired, or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of —

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus —

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired or retainer pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired or retainer pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to

to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable rtired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at this last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

TITLE 28 U.S.C.

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. For the purpose of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

§TITLE 38 U.S.C.

§310. Basic Entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

TITLE 38 U.S.C.

§315. Additional compensation for dependents

Any veteran entitled to compensation at the rates provided in section 314 of this title, and whose disability is rated not less than 30 percent shall be entitled to additional compensation for

for dependents in the following monthly amounts:

(1) If and while rated totally disabled and—

(A) has a spouse but not child, $82;

(B) has a spouse and one or more children, $138 plus $44 for each child in excess of one;

(C) has no spouse but one or more children, $57 plus $44 for each child in excess of one;

(D) has a parent dependent upon veteran for support, then, in addition to the above amounts, $67 for each parent so dependent;

(E) nothwithstanding the other provisions of this paragraph, the monthly payable amount on account of a spouse who is (i) a patient in a nursing home or (ii) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person, shall be $149 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section; and

(F) notwithstanding the other provisions of this paragraph, the monthly amount payable on account of each child who has attained the age of eighteen years and who is pursuinga course of instruction at an approved educational institution shall be $126 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section.

(2) If and while rated partially disabled, but not less than 30 percent in an amount having the same ratio to the amount specified in paragraph (1) of this section as the degree of disability bears to total disability. The amounts payable under this paragraph, if not a multiple of $1, shall be rounded down to the nearest dollar.

TITLE 38 U.S.C.

§3012. Effective dates of reductions and discontinuances

(a) Except as otherwise specified in this section, the effective date of reduction or discontinuance of compensation, dependency and indemnity compensation, or pension shall be fixed in accordance with the facts found.

(b) The effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension —

(1) by reason of marriage or remarriage, or death of a payee shall be the last day of the month before such marriage, remarriage, or death occurs;

(2) be reason of marriage, annulment, divorce, or death of a dependent of a payee shall be the last day of the month in which such marriage, annulment, divorce, or death occurs;

(3) by reason of receipt of active service pay or retirement pay shall be the day before the date such pay began;

(4) by reason of —

(A) change in income shall (except as provided in section 3112 of this title) be the last day of the month in which the change occurred; and

(B) change in corpus of estate shall be the last day of the calendar year in which the change occurred;

(5) by reason of a change in disability or employability of a veteran in receipt of pension shall be the last day of the month in which discontinuance of the award is approved;

(6) by reason of change in law or administrative issue, change in interpreation of a law or administrative issue, or, for compensation purposes, change in service-connected or employability status or change in physical condition shall be the last day of the month following sixty days from the date of notice to the payee (at the payee's last address of record) of the reduction or discontuance;

(7) by reason of the discontinuance of school attendance of a payee or a dependent of a payee shall be the last day of the month in which such discontinuance occurred;

(8) by reason of termination of a temporary increase in compensation for hospitalization or treatment shall be the last day of the month in which the hospital discharge or termination of treatment occurred, whichever is earlier;

(9) by reason of an erroneous award based on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge, shall be the effective date of the award; and

(10)by reason of an erroneous award based solely on administrative error or error in judgment shall be the date of last payment.

(c) The effective date of a discontinuance under section 3203(b)(1)(A) of the title of pension, compensation, or emergency officers' retirement pay be reason of hospital treatment or institutional or domiciliary care shall be the last day of the first month of such treatment or care during which the value of the veteran's estate, as determined under such section, equals or exceeds $1,500.

TITLE 38 U.S.C.

§3101. Nonassignability and exempt status of benefits

(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity. For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving his or her benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or his estate; or (2) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws to such beneficiary or his estate to his dependents as such.

If the benefits referred to in the preceding sentence are insurance payable by reason of yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance issued by the United States, the exemption provided in this section shall not apply to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness is in the form of liens to secure unpaid premiums or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits.

(c) Notwithstanding subsection (a), payments of benefits under laws administered by the Veterans' Administration shall not be exempt from levy under subchapter D of chapter 64 of the Internal Revenue Code of 1954 (relating to seizure of property for collection of taxes).

(d) In the case of a person who —

(1) has been determined to be eligible to receive pension or compensation under laws administered by the Veterans' Administration but for the receipt by such person of pay pursuant to any provision of law providing retired or retirement pay to members or former members of the Armed Forces or commission officers of the National Oceanic and Atmospheric Administration or of the Public Health Service; and

(2) files a waiver of such pay in accordance with section 3105 of this title in the amount of such pension or compensation before the end of the one-year period beginning on the date such person is notified by the Veterans' Administration of such person's eligibility for such pension or compensation,

the retired or retirement pay of such person shall be exempt from taxation, as provided in subsection (a) of this section, in an amount equal to the amount of pension or compensation which would have been paid to such person but for the receipt by such person of such pay.

TITLE 38 U.S.C.

§3105. Waiver of retired pay

Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed

Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Veterans' Administration of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay.

TITLE 42 U.S.C.

§659. Enforcement of individual's legal obligations to provide child support or make alimony payments.

(a) United States and District of Columbia to be subject to legal process.

Notwithstanding any other provision of law (including section 407 of this title) effective January 1, 1975, moneys (the entitlement to which is based upon renumeration for employment) due from, or payable by, the United States or District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United State or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

TITLE 42 U.S.C.

§662. Definitions

For purposes of section 659 of this title — [enforcement of individual's legal obligations to provide child support or make alimony payments].

(c) The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse

(or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

TITLE 45 U.S.C.

§231m. Assignability; exemption from levy

(a) Except as provided in subsection (b) of this section and the Internal Revenue Code of 1954 [26 U.S.C.A. § 1 et seq.], notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated

(b)(1) This section shall not operate to exclude the amount of any supplemental annuity paid to an individual under section 231a(b) of this title from income taxable pursuant to the Federal taxable pursuant to the Federal income tax provisions of the Internal Revenue Code of 1954 [26 U.S.C.A. § 1 et seq.].

(2) This section shall not operate to prohibit the characterization or treatment of that portion of an annuity under this subchapter which is not computed under section 231b(a), 231c(a), or 231c(f) of this title, or any portion of a supplemental annuity under this subchapter, as community property for the sole purposes of, or property subject to, distribution in accordance with a court decree of divorce, annulment, or legal separation or the terms of any court-approved property settlement incident to any such court decree. The Board shall make payments of such portions in accordance with any such characterization or treatment or any such decree or settlement.

CALIFORNIA RULES OF COURT

Rule 977. Citation of unpublished opinions prohibited; opinions ordered published by Supreme Court

(a) **[Unpublished opinions]** An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) **[Exceptions]** Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of the law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

(c) **[Citation procedure]** A copy of any opinion citable under subdivision (b) shall be furnished to the court and all parties by attaching it to the document in which it is cited, or, if the citation is to be made orally, within a reasonable time in advance of citation.

(d) **[Opinions ordered published by Supreme Court]** An opinion of the Court of Appeal ordered published by the Supreme Court pursuant to the rule 976 is citable.

SUPREME COURT OF THE UNITED STATES

ATTORNEY APPEARANCE FORM

No. _____

GERALD E. MANSELL, Appellant

vs.

GAYE M. (MANSELL) FORBES, Appellee

The Clerk will enter my appearance as counsel for Gerald E. Mansell, who in this Court is appellant.

I certify that I am a member of the Bar of the Supreme Court of the United States.

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CERTIFICATE OF SERVICE

I, JIM T. ELIA, one of the attorneys for appellant, Gerald E. Mansell, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of July, 1987, I served copies of the foregoing jurisdictional statement on the several parties hereto, as follows:

1. The Attorney General of the State of California by depositing a copy of the document in a United States mail box, with First Class Postage prepaid, addressed to Attorney General of the State of California, 350 McAllister Street, San Francisco, California 94102.

2. On Gaye M. (Mansell) Forbes, by depositing a copy of the document in a United States mail box, with First Class Postage prepaid, addressed to her counsel of record, Dennis A. Cornell, ALLEN, CORNELL, POLGAR & PROIETTI, Post Office Box 2184, Merced, California 95344.

As a result of the foregoing, all parties required to be served have been served.

Jim T. Elia

JIM T. ELIA
Counsel for appellant

MOTION

Supreme Court, U.S.
FILED
NOV 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-201

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1987

GERALD E. MANSELL, Appellant

vs.

GAYE M. (MANSELL) FORBES, Appellee

ON APPEAL FROM THE COURT OF APPEAL

OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MOTION TO DISMISS

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136 U.S. 586, 10 S.Ct. 850 — 8

Fenn, et al v. Harris, et al (1984)
104 S.Ct. . — 12

Hisquierdo v. Hisquierdo (1979)
439 U.S. 572 — 16

McCarty v. McCarty (1981)
453 U.S. 210, 101 S.Ct. 2728 — 4, 6, 7, 8, 14-16

Ridgway v. Ridgway (1981)	
454 U.S. 46, 102 S.Ct. 49	16
Rose v. Rose (1987)	
107 S.Ct. 2029	5, 8, 16
Congressional Reports	
Senate Report	
No. 97-502	4, 9 App. A 1-3
House Conference Report	
No. 97-749	4, 5, App. B-1
Federal Statutes:	
10 U.S.C. 1408	2, 3, 4, 5, 7-15
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Railroad Retirement Solvency Act (PL-98-76)	16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-201

GERALD E. MANSELL, Appellant

vs.

GAYE M. (MANSELL) FORBES, Appellee

On Appeal from the Court of Appeal

of California

Fifth Appellate District

Pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, GAYE M. MANSELL, the Appellee herein, moves this Court to dismiss with costs the appeal taken to this Court by GERALD E. MANSELL, upon the following grounds:

I. FEDERAL LAW DOES NOT PREEMPT THE STATE'S JURISDICTION OVER ISSUES INVOLVING DOMESTIC

RELATIONS.

II. FEDERAL LAW DOES NOT PREEMPT THE STATE'S JURISDICTION TO ENFORCE STIPULATED JUDGMENTS AND THEREFORE APPELLANT'S CLAIM UNDER 38 U.S.C SEC. 3101 IS IRRELEVANT.

ARGUMENT

I

I. FEDERAL LAW DOES NOT PREEMPT THE STATE'S JURISDICTION OVER ISSUES INVOLVING DOMESTIC RELATIONS.

California courts have interpreted 10 U.S.C. Sec. 1408, known as the Federal Uniformed Services Former Spouses Protection Act (FUSFSPA) according to the language of the Act and its legislative intent. It is upon this basis that the state courts have applied FUSFSPA to the cases which come before them. Sec. 1408 of U.S.C. Title 10 is entitled "Payment

of retired or retainer pay in compliance with court orders." It does not address the issue of entitlement. It does address the procedure and limitation of garnishment. It allows direct payment by the government payroll center to a former spouse up to a ceiling of fifty percent in conjunction with a court order. Sec. 1408 (e)(6) states,

> "Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order...Any such unsatisfied obligation of a member may be enforced by any means available under law..." (emphais added)

The Act does not expressly or impliedly preempt a state's right to classify property. In fact, Sec. 1408 (c)(1) explicitly states that,

> "Subject to the limitations of this section, a court may treat disposable retired or retainer pay as payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his

spouse in accordance with the law of the jurisdiction of such court." (Emphasis added).

Grounds to uphold federal pre-emption do not exist in the language. The state court in this case is not attempting to force the payroll center to garnish beyond the limitations defined by the Act. In accordance with the law of California, military retirement pay is community property to which Appellee has a right to recover her interest, both through garnishment under FUSFSPA and other remedies available within the state courts. Thus no federal question exists.

The intent of the Senate to absolutely overrule the holding of this court in McCarty v. McCarty (1981) 453 U.S. 210 can be found in its Senate Report No. 97-502, which stated in relevant part as attached in Appendix A. The intent of Congress if further indicated in House Conference Report No.

97-479, which states in relevant part as attached in Appendix (B).

The very clear intent of Congress as indicated in these reports leaves to the individual states the chore of dealing with the division of military benefits in a domestic relations context.

Most recently this court addressed the issue of federal preemption in Rose v. Rose (1987) 107 S.Ct. 2029, in a case involving child support. The court cited numerous cases saying that federal law does not preempt without the indication that there is clear danger to substantial interests. Rose found that since the purpose of 10 U.S.C. Sec. 3101 was to avoid making the Veteran's Administration a collection agency and to protect the member from depletion of his main income, there was no grounds for preemption of state law. In the present case, Appellee is not seeking to make the V.A. a collec-

tion agency nor depletion of the member's main income.

California courts have long held that military retirement pay must be divided as community property. In re the Marriage of Fithian (1974) 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449, cert. denied 419 U.S. 825, and In re Marriage of Milhan (1980) 27 Cal.3d 765, 166 Cal.Rptr. 533, 517 P.2d 449, cert. denied 419 U.S. 825) laid out the rationale that the retirement pay classification was consistent with long established California law.

The U.S. Supreme Court in McCarty v. McCarty (1981) Supreme Court 2728, found that while there was no express prohibition against such a classification, it was circumstantially implied, and Congress had shown no intent to treat military retirement pay as community property. Congress then quickly

demonstrated its express intent to allow such classification by passage of FUSFSPA and stated its retroactive status extended to the day prior to McCarty.

Under In re Marriage of Buikema (1980) 139 Cal.App.3d 689, 188 Cal.Rptr. 856, the court stated that "California law treating military retirement pensions as community property is no longer pre-empted," (page 857) and further, with In re Marriage of Frederick (1983) 190 Cal. Rptr. 588, stated,

> "...the selection of the period after June 25, 1981 as addressed by the above statute can only by taken as an oblique reference to the McCarty decision and appears intended to repair the seamless web of pre-McCarty law as though never torn asunder." (Page 590).

The court examined both the language of the Act and the legislative intent in In re Marriage of Hopkins (1983) 142 Cal. App.3d 350, 191 Cal.Rptr. 70, and also Casas v. Thompson (1986) 42 Cal.3d 131,

228 Cal.Rptr. 33 (pages 43, 45, 46). Casas particularly gives an in-depth analysis of the language and legislative intent of FUSFSPA, and then lays forth the reasoning behind the application of FUSFSPA to California community property laws.

After reciting the now well established history of McCarty and FUSFSPA, the court reached further back to the basic premise in Ex Parte Burrus (1890) 136 U.S. 586 (pages 593, 594), 10 S.Ct. 850, 34 L.Ed. 500 (also cited by this court in Rose, supra), which held

> "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States."

McCarty denied that proposition and it was estored by FUSFSPA. Casas found that there is no pre-emption, express or implied, and that the application of com-

munity property laws did not endanger or interfere with the laws or intended purposes of the United States or its military.

Casas held that FUSFSPA is a garnishment statute (consistent with Senate Report No. 97-502, supra), and as far as its limitation to "disposable" pay stated,

> "That compensation was earned by the community during the marriage and, once the pension vests, becomes the 'property' of the community in the generic sense. The concept of 'disposable' pay or income has nothing to do with the characterization of the asset."

In summarizing the case, the court stated,

> "FUSFSPA's intended limitations reach only restrictions on the garnishment of and direct payment from the retiree's disposable pay. Characterization of retirement pay remains a state law question. Thus, in California the military retiree's gross pay is a community asset subject to equal division."

It must be pointed out here that the court is not referring to disability pay. The California courts have never said that disability pay is subject to division

under community property laws. This has never been an issue with the courts or the Appellee despite Appellant's jurisdictional statement invoking federal supremacy under 38 U.S.C. Sec. 3101.

Rather than flaunting federal laws, what California has done through careful analysis and diligent application of the language and legislative intent of FUSFSPA, and state laws, is to protect the former spouse's interest in an existing community property even though the member voluntarily elects disability pay. As stated in In re Marriage of Mastropaolo (1985) 166 Cal.App.3d 953, 213 Cal.Rptr. 26 (page 33).

> "...one spouse may not be permitted by exercise of a power wholly within that spouse's control to transmute what would otherwise be the community property of both spouses into his or her separate property...The situation presented is a classic one for the imposition of a resulting trust... Where only a portion of the acquisition price has been furnished, a resulting trust may be established in

a fractional trust on a pro tanto basis...The same logic should apply here. So far as we are aware the federal courts recognize the resulting trust doctrine in appropriate circumstances, and we are convinced they would find it appropriate here to further the congressional intent to protect spouses of service personnel that is manifest in FUSFSPA."

More recently, In re Marriage of Daniels (1986) 186 Cal.App.3d 1084, 231 Cal.Rptr. 169 (pages 171, 173, 174), upheld Mastropaolo reasoning,

"...although generally speaking disability retirement pensions are the separate property of the employee spouse, when the employee spouse was also eligible to receive regular longevity retirement benefits at the time he or she retired for disability, 'it would be inconsistent with community property principles "to permit the employee spouse to transmute what would otherwise be community property into his or her separate property.'... absent persuasive reasons for proceeding otherwise, our approach in this case would be simply to ascertain what portion of the divided asset represented the original longevity pension, in which wife would have had an incontrovertible community property interest ...we would conclude, as we did in our Mastropaolo decision, that husband would receive his separate property monthly payment from the federal

government as a resulting trustee of wife's share. We believe federal law would embrace as just and in furtherance of FUSFSPA's purposes the resulting trust doctrine we announded in [Becker] and later reaffirmed in Mastropaolo...Under FUSFSPA, at the time the military spouse becomes eligible for longevity retirement the non-military spouse's right to share in the retirement benefits becomes fully recognized, and it was the specific purpose of FUSFSPA to recognize and protect the rights of military spouses. We are confident federal law would not be interpreted to permit one spouse at his or her election to defeat the other spouse's fully recognized rights any more than California law does."

As a further indication of the correctness of Appellee's position, Fenn, et al v. Harris, et al (1984) 91 Cal.App. 3d 772, 154 Cal.Rptr. 21, 104 S.Ct. (1984), along with Casas 107 S.Ct. (1986) and Mastropaolo 106 S.Ct. (1986), which all dealt with these same issues cited herein, were denied a writ of certiorari by this Court. In re Marriage of Orr (1979) [not officially published) 157 Cal.Rptr. 301, and In re Marriage of

Costo (1984) 156 Cal.App.3d 781 are the only two California cases which are in agreement with the position taken by Appellant. However, Orr was overturned and depublished by the State Supreme Court and, pursuant to California Rule of Court 977, cannot be cited as authority. Costo was never appealed to the State Supreme Court, nor was there ever a request to have the opinion depublished. Even so, Costo is no longer the law in California. It was heavily criticized in Casas as well as other cases. As a result, Appellant has no state authority to cite.

Appellee agrees that, in general, disability pay is a retired member's separate property, which is not open to garnishment. However, after garnishment of retirement pay within FUSFSPA limits, a former spouse is free to pursue his or her interest through other remedies provided by state law and in keeping with the

language and legislative intent of FUSFSPA. Any other posture would allow a service member to circumvent the express intent of FUSFSPA.

II. FEDERAL LAW DOES NOT PREEMPT THE STATE'S JURISDICTION TO ENFORCE STIPULATED JUDGMENTS AND THEREFORE APPELLANT'S CLAIM UNDER 38 U.S.C. SEC. 3101 IS RELEVANT.

Even if FUSFSPA had never been passed and McCarty were still the law, Appellee in the present case would still be entitled, very specifically, to Appellant's disability pay. The real issue in this case is not the right of California to classify property for community property, but whether this Court has the right to interfere with a stipulated judgment.

Appellant failed to mention in his jurisdictional statement that the judgment from which he seeks an appeal

incorporates a property settlement agreement (attached herein as Appendix C in which he stipulated that not only his retirement pay but his disability pay was community property. After that judgment was entered, and after McCarty was announced, he unilaterally stopped payment not only on the disability portion of his pay, but on the retirement portion as well. Appellee sought enforcement of that stipulated judgment from which he now wishes to appeal. Upholding Appellant's argument would not only allow him to circumvent the intent of FUSFSPA, but would also result in this Court's unprecedented interference with state laws regarding enforcement of a stipulated judgment. Appellee is aware of no law which gives rise to a federal question regarding state limitations to overturn stipulated judgments.

California law is quite clear:

"Once judgment has been entered, the

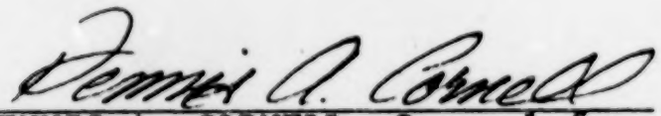
> trial court loses the unrestricted power to change it...Thereafter, unless jurisdiction has been reserved, a judgment can only be set aside or modified if it contains a clerical error, is void on its face, or resulted from extrinsic fraud or mistake," Farner v. Farner (1987) California Court of Appeal 1 Civil A035634 (cited from Daily Appellate Report attached herein as Appendix E).

No federal question arises within this issue under the doctrine of res judicata.

In addition to contending Appellant's argument is based upon incomplete information, Appellee contends that the authorities upon which he invokes 38 U.S.C. Sec. 3101 have been overcome by federal statute or case law. McCarty was overcome by FUSFSPA, Hisquierdo v. Hisquierdo (1979) 439 U.S. 572 was overcome by the Railroad Retirement Solvency Act (PL 98-76) (1983) and Ridgway v. Ridgway (1981) 454 U.S. 46, 102 S.Ct. 49 has apparently been overcome by this Court's ruling in Rose v. Rose (1987) U.S. Supreme Court 85-1206.

WHEREFORE, Appellee requests the court to grant this Motion to Dismiss with costs this appeal for lack of finding federal question.

Respectfully submitted,



DENNIS A. CORNELL, Counsel for Appellee
ALLEN, CORNELL, POLGAR & PROIETTI

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-201

GERALD E. MANSELL, Appellant vs. GAYE M. (MANSELL) FORBES, Appellee.	ORDER TO DISMISS

This cause having been heard on a motion by counsel for the Appellee to dismiss the appeal herein, it is now here ordered, adjudged and decreed by this Court that the appeal be and the same is hereby dismissed with costs.

Dated:

JUSTICE OF UNITED STATES SUPREME COURT

SENATE REPORT 97-502

Purpose of the Bill

"The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in McCarty v. McCarty, 453 U.S. 210 (1981)...by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce...(page 2).

...there is a growing body of state laws and precedents in the area of dividing pensions and retired pay (page 2).

Provisions of S. 1814

No right or entitlement to military retired pay is created by S. 1814. The bill does not require any division of retired pay by a State court; nor does it prohibit such division (page 4).

Impact on Retention and Recruiting

But the committee believed it was necessary to evaluate fully the concerns generated by the Defense Department and the military services relative to force management...The Department of Defense has not submitted any satisfactory evidence based on reasonable or realistic assumptions concerning divorce proceedings in the State

courts to show that during the period prior to the McCarty decision, recruiting, retention and personnel assignment were adversely affected by application of State property laws to military retired pay...Further, three of the four military services have not provided any empirical evidence that division of military retired pay in divorce cases has or would adversely affect recruiting and retention (page 8). Based on these considerations and the record developed in the hearings, the committee believes that returning to the State courts--with certain limitations--the discretion to deal with military retired pay in divorce cases is a sound prescription for the admitted problems created by the McCarty decision (page 9).

Enforcement of Limitation for a

Portion of Retired Pay

The committee also recognized that in some instances this 50-percent cap could leave unsatisfied portions of an individual's obligations for alimony, child support, or other payments. The committee firmly believed that the government should assist a former spouse in the enforcement of these obligations...Moreover, the bill makes it clear that the mere attainment of that ceiling in no way absolves the former member of still oustanding legal obligations for alimony, child support or other payments. Any such unsatisfied obligation may be enforced by any other means available under the law other than those means afforded by this or Section 459 of the Social

courts to show that during the period prior to the McCarty decision, recruiting, retention and personnel assignment were adversely affected by application of State property laws to military retired pay...Further, three of the four military services have not provided any empirical evidence that division of military retired pay in divorce cases has or would adversely affect recruiting and retention (page 8). Based on these considerations and the record developed in the hearings, the committee believes that returning to the State courts--with certain limitations--the discretion to deal with military retired pay in divorce cases is a sound prescription for the admitted problems created by the McCarty decision (page 9).

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Security Act (page 12).

Section-by-Section Analysis of S. 1814

The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable...However, there is no limit on a spouse's or former spouse's right to deal with a portion of a member's retired or retainer pay after the spouse or former spouse receives that pay (pages 16 and 17).

Paragraph (6) of subsection (e) is intended to preserve vehicles of enforcement--other than those available under section 1408 and the garnishment statute--where a member's liability for child support, alimony or other payments exceeds the maximum amounts the Secretary is authorized to pay out of disposable retired or retainer pay under Section 1408" (page 22). (Emphasis added).

House Conference Report No. 97-479

"...This provision would have the effect of reversing the decision of the United States Supreme Court in the case of McCarty...would also permit the former spouse to receive court-awarded payments directly from the military finance center without having to resort to periodic garnishment proceedings. Direct payments could be made out of military retired pay for court-awarded alimony, child support, and division of property... This provision would have the effect of expanding existing garnishment procedures in Section 459 of the Social Security Act (42 U.S.C. 659) as they apply to military retired pay to include garnishment for non-payment of property settlements...The House amendment would apply to court orders finalized before the McCarty decision, but not to subsequent modifications thereto which would have the effect of implementing the holding of McCarty...Currently there is no Federal enforcement mechanism for court-awarded property division of military retired pay available to former spouses of military personnel. The conferees agreed to a Federal enforcement provision as described above..." (pages 165-167) (Emphasis added).

PROPERTY SETTLEMENT AGREEMENT

We, GERALD E. MANSELL, hereinafter referred to as "Husband", and GAYE M. MANSELL, hereinafter referred to as "Wife", make this agreement, the purpose of which is to make a final and complete settlement of all rights and obligations between us, including our respective property rights and our rights and obligations concerning the support of wife and our child and the custody of our child.

A. We make this agreement with reference to the following facts:

1. We were married on July 24, 1954, in the City of Pittsburg, State of Pennsylvania, and ever since have been and are Husband and Wife.

2. We separated on May 15, 1977.

3. We have six (6) children of our marriage including the following minor child:

NAME	BIRTHDATE	AGE	SEX
Bernadette	October 27, 1964	14	F

4. Because unhappy differences have arisen between us, we have agreed and now agree to separate immediately and to live permanently apart hereafter.

B. We agree that we now own the assets as listed in Schedules A and B as our community property.

C. We agree that Husband now owns the following property as his separate property:

All checking, savings and credit union accounts in the name of Husband opened after the date of separation.

D. We agree that Wife now owns the following property as her separate property:

1978 Oldsmobile automobile;
All checking, savings and credit union accounts in the name of Wife opened after the date of separation.

E. We agree that we now own approximately fourteen shares of stock in the

American Telephone and Telegraph Company, and we also own approximately two and one-half acres of undeveloped land in the State of Florida. We agree that all interest that we may have in these two items of property shall be given to Wife's mother, Trese Mihm, of 90 Woodhaven Drive, Pittsburgh, Pennsylvania.

F. Each of us warrants to the other that the warrantor does not own any property of any kind, other than the property listed in this agreement. If it later appears that either warrantor now owns any other property, and that the warrantee has an interest in this other property, the warrantor agrees to transfer or pay to the warrantee, at the warrantee's election (a) an amount of the other property equal to the warrantee's interest in it, if it is reasonably susceptible to division, (b) the full market value of the warrantee's interest on the effective date

of this agreement, or (c) the full market value of the warrantee's interest at the time the warrantee discovers the warrantor's ownership of the property. This agreement is not intended to impair the availability, in a court of competent jurisdiction, of any other remedy arising from the undisclosed ownership.

G. Each of us warrants to the other that the warrantor has not made, without the warrantee's knowledge and consent, any gift or disposition of our community property, other that dispositions in exchange for a valuable consideration to the community. If it later appears that warrantor has made a disposition of community property contrary to this warranty, the warrantor shall pay the warrantee one-half of the fair market value of that community property, measured, at the warrantee's election (a) on the effective date of this agreement, or (b) at the time the war-

rantee discovers the disposition, less appreciation in value attributable solely to the acts of the donee and his successors. This agreement shall not impair the availability, in a court of competent jurisdiction, of any other remedy arising from the undisclosed disposition.

H. We agree to divide our community assets listed in Schedules A and B according to the provisions of Paragraph I. Unless otherwise provided by this agreement, the assets and interests received by each party under this division shall, when received, be and remain the receipient's separate property.

I. 1. Husband shall take the assets listed in Schedule A as his separate property.

2. Wife shall take the assets listed in Schedule B as her separate property.

3. Husband agrees that Wife's

share of the retirement pay and compensation from the Veteran's Administration accrued through Husband's employment by the United States Air Force shall be paid directly to Wife by allotment through the Air Force accounting system, and that such allotment shall, at all times, equal 50% of the gross retirement pay earned by Husband, a portion of which includes compensation from the Veteran's Administration. We also agree that the Court may reserve jurisdiction over the distribution of the retirement pay and compensation from the Veteran's Administration earned by Husband through his employment with the United States Air Force.

4. We agree that the family residence of the parties located at 665 Dennis Court, Merced, California, shall be listed for sale upon the date of the execution of this Agreement, and the proceeds of the sale shall be divided equally between

the parties after the payment of all encumbrances on such property, and the costs of sale and the payment of the sum of $1,500.00 to Wife; provided, however, in the event that Husband pays to Wife the sum of $20,500.00 within ninety (90) days of the date of the execution of this Agreement, as and for Wife's share of the equity in such family residence, then Husband shall receive the entire interest of the parties in the family residence, subject to all encumbrances against such property.

5. Wife agrees to remove from the family residence of the parties all items currently located at the family residence which are distributed to Wife under Schedule "B" of this Agreement.

J. By the provisions of Paragraph I, we intend to effect an equal division of our community assets. Each of us therefore agrees that the tax basis of each

asset allocated to him under those provisions has not changed and will not change by reason of this division, and each agrees not to seek a new tax basis for any asset grounded on any such change. If either party seeks a new basis for any such asset and the other party is later assessed for additional federal or state income taxes on the ground that any disposition of assets under those provisions was a taxable event, the party seeking the new basis shall indemnify the other party in the amount of the tax liability arising from the assessment; provided, however, Wife shall assume all liability for any taxes assessed against the sums of money received by Wife pursuant to the terms of Paragraph I (4).

K. Each of us waives and renounces any and all rights to inherit the estate of the other at the other's death, or to receive any property of the other under a

Will executed before the effective date of this agreement, or to claim any family allowance or probate homestead from the other's estate, or to act as executor or other personal representative under a Will of the other executed before the effective date of this agreement, or to act as administrator, or as administrator with the Will annexed, of the other's estate except as the nominee of another person who is legally entitled to make nominations for administrator.

L. Following is a list of all obligations on which either or both of us are liable:

1.	Dr. Parker, D.D.S.	$ 340.00
2.	Ft. Sam Houston loan	689.00
3.	Loan against life insurance	2,391.55

M. Husband agrees to assume and pay the following obligations and hold Wife harmless therefrom:

1.	Dr. Parker, D.D.S.	$ 340.00

2.	Ft. Sam Houston loan	$ 689.00
3.	Loan against life insurance	2,391.55

In the event that Husband receives the family residence of the parties in accordance with the terms of this Agreement, then Husband agrees to assume all obligations and encumbrances against such family residence, and to hold Wife harmless therefrom.

N. Wife acknowledges that as between us, the following obligations are her sole and separate obligations, incurred for the benefit of her spearate estate and not on behalf of our community estate, and agrees to assume and pay them without contribution from Husband, either directly or by way of offset in the division of our property:

1.	Dr. Wilhelm, D.D.S.	$ 800.00
2.	MasterCharge	100.00
3.	Leap Insurance Agency	600.00
4.	Pentagon Federal Credit Union	4,300.00

O. Each of us warrants to the other that on or before the execution of this agreement the warrantor shall not incur any obligation that is not disclosed by this agreement and that is either an obligation on which the other party is or may become personally liable or an obligation that could be enforced at any time against an asset held, or to be received under this agreement, by the other party. Each of us covenants not to incur any such obligation on or after execution of this agreement, except as expressly authorized by this agreement, by subsequent agreement between us, or by order of a court of proper jurisdiction.

P. Each party shall indemnify the other against liability on any obligation assumed by the indemnitor under Paragraph M, and on any obligation whose existence or incurrence transgresses the indemnitor's warranty or covenant in Paragraph

O, and shall, at his sole expense, defend the other party against any claim, action or proceeding, whether or not well founded, brought to assert any such liability.

Q. Wife waives all rights and claims to receive any money or property for her support from Husband at any time.

R. Husband shall have the sole custody of our minor child, namely, BERNADETTE, born October 27, 1964, age 14.

S. We agree that neither party shall pay the other any money or property as and for the support, care and maintenance of the minor child of the parties, but, the issue of the payment of such support shall be reserved by the Court for future consideration.

T. Wife shall have the right to visit our child at reasonable times and places.

U. We agree that we will file separate federal and state declarations of estimated tax and tax returns for the tax years beginning 1978, and that each of us will be solely responsible for the entire tax on his separate declarations of estimated tax and returns.

V. Husband has retained HUGH FLANAGAN, of FLANAGAN & CORMAN, an attorney at law duly licensed to practice in the State of California, to advise him in connection with this agreement and the pending proceeding for dissolution of marriage.

Wife has retained DENNIS A. CORNELL, of ALLEN, IVEY, MARKS, CORNELL, MASON & CASTELLUCCI, an attorney at law duly licensed to practice in the State of California, to advise her in connection with this agreement and the pending proceeding for dissolution of marriage.

W. Husband and Wife each agrees to

pay his own attorneys fees in an amount to be agreed on between each of them and his respective attorney.

X. This agreement contains the entire agreement of the parties on the matters it covers, and it supersedes any previous agreement between us. No other agreement, statement, or promise made by or to either of us or the agent or representative of either of us shall be binding on us unless it is in writing and signed by both of us, or unless contained in an order of a court of competent jurisdiction.

Y. This agreement shall inure to the benefit of and be binding on each of us and the heirs, personal representatives, assigns, and other successors in interest of each of us.

Z. Any reconciliation between us shall not cancel, terminate or modify the force or effect of any provision

of this agreement dealing with the present assets or obligations of either or both of us.

AA. Each of us agrees, on the demand of the other, to execute or deliver any instrument, furnish any information, or perform any other act reasonably necessary to carry out the provisions of this agreement without undue delay or expense. Either of us who fails to comply with this paragraph shall reimburse the other party for any expenses, including attorneys fees and court costs, that as a result of this failure become reasonably necessary for carrying out this agreement.

BB. This agreement shall be submitted to the Court for incorporation and merger into the Interlocutory Judgment of Dissolution in the pending proceeding between us.

We execute this agreement on May 25,

1979, and make it effective on that date.

/s/ Gerald E. Mansell
GERALD E. MANSELL, Husband

/s/ Gaye M. Mansell
GAYE M. MANSELL, Wife

ALLEN, IVEY, MARKS, CORNELL,
MASON & CASTELLUCCI

By /s/ Dennis A. Cornell
DENNIS A. CORNELL,
Attorneys for Wife

FLANAGAN & CORMAN

By /s/ Hugh Flanagan
HUGH FLANAGAN,
Attorneys for Husband

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Attorneys for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MERCED

GAYE M. MANSELL, Petitioner, vs. GERALD E. MANSELL, Respondent.	NO. 55594 STIPULATION AND WAIVER

Respondent hereby stipulates that the above-entitled matter can be set for hearing at a day and time convenient to Petitioner and her attorneys and Respondent hereby waives notice of time and place of trial, findings of fact and conclusions of law, the right to move

for a new trial, the right of time to appeal, and all rights granted or which may accrue to him under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 and all amendments thereto.

Dated: May 25, 1979

/s/ Gerald E. Mansell
GERALD E. MANSELL

Dated: May 25, 1979

FLANAGAN & CORMAN

By /s/ Hugh M. Flanagan
HUGH M. FLANAGAN, Attorney
for Respondent

FAMILY LAW

Cite as 87 Daily Journal D.A.R. 8235

In re Marriage of Shirley and Lyle Farner.

SHIRLEY FARNER,
Respondent,
v.
LYLE L. Farner,
Appellant.

No. A035634
Super. Ct. No. 71026
California Court of Appeal
First Appellate District
Division Four
Filed October 30, 1987

Lyle Farner ("husband") challenges the trial court's order awarding a share of his military retirement benefits to his former wife, Shirley Farner ("wife") The questions presented are: (1) Was modification of the judgment authorized by Civil Code section 5124? (2) Did the trial court properly deem a judgment filed "nunc pro tunc" so as to bring it within the statutory "window" provided by section 51247 (3) Does section 5124 effect an impermissible retroactive divestiture of property so as to violate husband s right to due process of law?

I. LEGAL BACKGROUND

For at least 40 years preceding 1981, California courts treated military retirement benefits earned during marriage as com munity property subject to division upon termination of the marriage. (See, e.g., **French v. French** (1941) 17 Cal.2d 775, overruled on another point in **In re Marriage of Brown** (1976) 15 Cal.3d 838, ascendancy, i.e., between June 26, 1981, and February 1, 1983.

The primary issue presented by this appeal is whether the trial court erred by treating the case as subject to section 5124, when judgment was not in fact entered until February 17, 1983. We find no error, and affirm.

II.
FACTS

Husband retired in 1974 after 20 years in the United States Air Force. In 1978 wife filed a petition for dissolution. The petition identified husband's retirement benefits, in effect, as community property, and husband's response, in effect, so admitted. In June 1981, pursuant to stipulation, the court entered interlocutory and final judgments dissolving the marriage, but reserving all other issues. At a further hearing in October 1981, the parties apparently stipulated to a disposition of many of the property issues, submitting others — specifically including the status of husband's pension — for the court's determination.

On October 28, 1981, the court issued a "memorandum opinion" reciting the stipulated issues and resolving some three dozen others. In light of the then-recent decision in McCarty v. McCarty, supra, 453 U.S. 210, the court determined that husband's military pension was his separate property. The court directed that wife's attorney prepare a "proposed interlocutbry judg.ient"[2] in accordance with the opinion and submit the same to the court after securing the approval of husband's attorney "as to form."

In January 1982, wife's attorney prepared a proposed judgment which provided, in accordance with the memorandum opinion, that husband would receive his military retirement benefits as separate property. This document was forwarded to husband's attorney with a self-addressed stamped envelope and a request that the judgment be approved and returned. For over a year, however, husband's attorney declined to approve the judgment because of disputes over matters apparently unrelated to the form of the judgment (and definitely unrelated to retirement benefits) Wife's attorney continued to request that the proposed interlocutory judgment be approved and returned, ultimately writing to the judge with a request that judgment be entered without further delay. Instead, at the instance of husband's attorney, the matter was set for further hearing. The ultimate result was a further stipulation prepared by wife's attorney, reciting that the proposed "interlocutory judgment" would be filed "forthwith" and that both parties waived any claim to a "dispairity [sic] payment."

Wife signed the stipulation on July 20, 1982. It was then apparently forwarded to husband's attorneys. Husband signed it on September 10, 1982, but for some reason it was not returned to wife's attorney until January 27, 1983 — four days before FUSFSPA took effect and the retroactive "window" of section 5124 closed. The stipulation and the "interlocutory judgment" were signed by the judge two weeks later, on February 15, and filed on February 17.

On February 2, 1984, wife moved to modify the judgment to grant her a share of the retirement benefits. For reasons which are not apparent, that motion was never heard. On December 24 and 31, 1985, wife again filed motions requesting that (1) the existing interlocutory judgment be entered "as of" July 7, 1982, and (2) the military pension be divided pursuant to Civil Code section 5124. In separate orders the court ruled that (1) equity required that the interlocutory judgment be deemed filed as of September 12, 1982; and (2) wife was entitled to 43.75% of husband's retirement pay, retroactive to the date of separation.

III. APPLICABILITY OF CIVIL CODE SECTION 5124

A. "Finality" of Judgment for Purposes of Section 5124

The characterization of a given judgment as "final" or not depends on the legal context in which the issue arises. (See 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, §§, 2, pp. 452-454.) A judgment is final for purposes of appealability if it "terminates the proceeding in the lower court by completely disposing of the matter in controversy." (**Henneberque v. City of Culver City** (1985) 172 Cal.App.3d 837, 841.) For purposes of res judicata the judgment must be final in this sense and in the further sense of being "free from direct attack," i.e., appeal. (7 Witkin, **op. cit. supra**. §§ 211, 212, pp. 648, 649.) For purposes of collateral estoppel, it may be enough if the judgment is "sufficiently firm to be accorded conclusive effect." (**Id.** at p. 216, p.. 653; **Sandoval v. Superior Court** (1983) 140 Cal.App.3d 932, 936; Rest.2d, Judgments, § 13; see **Producers Dairy Delivery Co. v. Sentry Ins. Co.** (1986) 41 Cal.3d 903, 911.)

The Legislature's reference to a "final" judgment in section 5124 occurs in yet another context — the rule against modification of final judgments.

Once judgment has been entered, the trial court loses the unrestricted power to change it. (7 Witkin, **op. cit. supra**. Attack on Judgment in Trial Court, § 66, p. 500.) The remedies then available to an aggrieved party are limited. If the judgment is simply claimed to be erroneous, the time to attack it ordinarily runs six months after entry of judgment or even sooner. (See Code Civ. Proc., §§ 659 [motion for new trial], 663a [motion to vacate]; Cal. Rules of Court, rule 2 [appeal].) Likewise, relief based on mistake, surprise, or excusable neglect must be sought within six months. (Code Civ. Proc., § 473.) Thereafter, unless jurisdiction has been

reserved, a judgment can only be set aside or modified if it co
tains a clerical error, is void on its face, or resulted from extri
sic fraud or mistake. (Ibid.; see generally 8 Witkin, op. cit. supr
Attack on Judgment in Trial Court.)

Wife's attempt to modify the judgment came well after th
usual time limits had expired.[3] There is no claim of clerical erro
or extrinsic fraud and no assertion that the judgment is void, ther
the trial court lacked on its face. Under the geheral rules the powe
to modify the judgment.

However section 5124 constitutes a further exception to the rul
of non-modifiability: a trial court may modify a judgment whic
became final while McCarty was law, provided proceedings ar
inst[illegible]ted before January 1, 1986. Since the statute is expressly aim
ed a[illegible]ification of judgments, its use of the term "final" mus
be understood in that context. We therefore conclude that it refer
to the date of entry of judgment, which is the triggering date fo
non-modifiability. It follows that as a general principle, section 512
applies to judgments which were entered during the statutor
window.

B. Power to Grant Nunc Pro Tunc Relief

The judgment in question was entered approximately thre
weeks too late to be "final" in the requisite sense during the perio
prescribed by section 5124. The trial court, however, deemed th
judgment to have been entered within the statutory period -
specifically, two days after husband signed the stipulation. Th
question therefore becomes whether this action was within th
court's power.

The trial court cited Civil Code section 4513, which empower
the court in a proper case to enter a decree of dissolution "as o
the date when the same could have been . . . entered originally."
Husband contends that section 4513 applies only to a decree dissolv
ing marital property, and not to a judgment disposing of marita
property. We need not resolve this issue because, accepting hus
band's construction for purposes of argument, it seems to us tha
the trial court had the power to grant "nunc pro tunc" relie
whether or not section 4513 applied.

"A nunc pro tunc order. . . . is an exercise of inherent oowe: of the court for the purpose of doing justice between the parties.' (**Wexler v. Goldstein** (1956) 146 Cal.App.2d 410, 412, emphasis add ed; see 7 Witkin, **op. cit. supra**, Judgment, § 62, pp. 496-497; **Phillip: v. Phillips** (1953) 41 Cal.2d 869, 875; **Douglas v. Douglas** (1958) 16- CaliApp.2d 225, 229; **Corbett v. Corbett** (1931) 113 Cal.App. 595, 60 [exercise of an "ancient authority"].) We see no basis for holdin that section 4513 was intended to limit or supersede this inheren power.[5] True, where a remedy is entirely a creature of statute, i " 'exists only so far and in favor of such person as the legislativ power may declare.' " (**Justus v. Actchison** (1977) 19 Cal.3d 564 575, quoting **Pritchard v. Whitney Estate Co.** (1913) 164 Cal. 564 568; disapproved on another point in **Ochoa v. Superior Court** (1985) 39 Cal.3d 159, 171.) However, "[t]here is a presumption that a statute is consistent with the common law, and so a statute creating a new remedy or method of enforcing a right which existed befor is regarded as cumulative rather than exclusive of the previous remedies." (2A Sutherland, Statutory Construction (Rev. 4th ed. 1984) § 50.05, p. 441.) "The general rule is that statutes do not sup plant the common law unless it appears that the Legislature in tended to cover the entire subject or, in other words, to 'occupy the field.' " (**I. E. Associates v. Safeco Title Ins. Co.** (1985) 39 Cal.3d 281, 285, quoting **Justus v. Atchison, supra**, 19 Cal.3d 564, 574-575.) Nothing in the language of section 4513 suggests an intent to diminish the court's common-law powers.

Indeed, the history of section 4513 strongly suggests that it was intended to supplement, not supersede, the common law remedy of nunc pro tunc entry. In 193[illegible] a court held that the inherent power to enter judgment nunc pro tunc did not extend so far as to retroactively validate a marriage entered while an earlier marriage remained technically undisolved,**Corbett v. Corbett supra**, 113 Cal.App. 595.) In **Macedo v. Macedo** (1938) 29 Cal.App.2d 387, the same court reached a contrary result based on the intervening enactment of the predecessor to section 4513. (Civ. Code, § 133, enacted 1935 Stats. ch. 407, § 1, p. 1459, repealed 1969 Stats. ch. 1608, § 3, p. 3313.) The court said its earlier holding had been "compelled by the statute as it then stood" (see Civ. Code, § 132, repealed 1969 Stats. ch. 1608, § 3, p. 3313; see now Civ. Code, § 4514), and that the new statute was enacted "to correct this situation." (29 Cal.App.2d at p. 390.)

In short, the statute is "both remedial and curative in character," enacted to dispel a perceived limitation on the inherent power of nunc pro tunc entry. (Macedo v. Macedo, supra, 29 Cal.App.2d at § 392; see Berry v. Berry, supra, 140 Cal.App.2d at p. 56 [section 133 "was enacted to avoid recurrence of the result in the Corbett case"].) As such it should be liberally construed. (Estate of Hughes (1947) 80 Cal.App.2d 550, 554 [section 133 "seeks to accomplish a beneficent purpose and the court should give it a construction as broad as its purpose appears to be"]; 2A Sutherland, op. cit. supra, § 58.04, p. 716 [liberal construction of curative statutes].) We therefore see no basis for holding that it operates to supersede or restrain the court's preexisting powers.[6] If the facts bring the case within the scope of those ancient powers, no error can be found in the trial court's exercising them to deem the judgment entered as of an earlier date.

C. Propriety of Nunc Pro Tunc Relief

In our view the case falls squarely within the pattern involves the death of a party after a decision is rendered but before formal entry of judgment. (See 7 Witkin, op. cit. supra, Judgment, § 64, pp. 498-499.) Here the case was largely if not entirely decided when the court rendered its memorandum decision in October 1981 — some 16 months before the cutoff date for relief under section 5124. Wife's attorney prepared a proposed judgment but husband's attorney declined to approve it as to form. There ensued some nine months of litigation skirmishes culminating in a stipulation which was signed by husband in September 1982, still well within the "window." For reasons which have yet to be explained, the stipulated judgment was retained by husband's attorneys until January 27, 1983 — four days before the cutoff date for relief under section 5124.[7]

The case was "decided," at the latest, when husband signed the stipulation. By the same token, the judgment was then ready for entry. The only apparent reason it was not entered within the statutory "window" is the failure of husband's attorneys to return it. This unexplained and unexcused lapse conferred no rights on husband. In September 1982 he expressly agreed to entry of the judgment "forthwith." The conduct of his attorneys violated this undertaking. Far from producing an "unconscionable" result, as husband asserts, the trial court's action gave effect to the fundamental maxims that no one should profit by his own wrong, and that courts will deem done that which should have been done.[8]

The purpose of nunc pro tunc entry is to preserve the legitimate fruits of litigation. (7 Witkin, op. cit. supra, Judgment, § 63, p. 497.) Wife was legitimately entitled to a judgment no later than September 10, 1982. That she did not get one was due to no fault of her own. The trial court did not err in deeming the judgment entered as of September 12, 1982.

D. Effectiveness of Nunc Pro Tunc Relief to Bring the Case Within Section 5124.

Husband further appears to contend that even if nunc pro tunc relief was otherwise available it had the impermissible effect here of circumventing section 5124 which, according to husband, contemplates a judgment actually filed within the stated period.

The statute refers to the date of finality, not to the date of filing. Like section 4513 it is both remedial and curative and should be construed broadly in accordance with its purpose. presumably the reason for the cutoff was the Legislature's expectation that judgments rendered after the effective date of FUSFSPA would not require any modification since attorneys would by then discover that military pensions were once again subject to treatment as community property. Had the pension issue in the present case not already been determined by the court, that legislative expectation might well have been fulfilled here. Since the case had already long since been adjudicated, however, nunc pro tunc entry did violence to neither the letter nor the spirit of the statute.

Of course, we do not endorse the whimsical use of nunc pro tunc relief to circumvent procedural time limits. The power to effect such relief poses a serious risk; taken to its outer limits it could destroy the objectives of certainty and repose which underlie much of our law of procedure. Were we not satisfied that this case presents extraordinary facts well within the traditional confines of the trial court's discretion, we would reverse the judgment however harsh the result. Under the peculiar legal circumstances, however, we are persuaded that the court had the power to grant nunc pro tunc relief. Accordingly there was no error in holding section 5124 applicable to the judgment.

IV. CONSTITUTIONALITY

Husband offers several incomplete and fragmentary contentions concerning the constitutionality of the order under review. The gist of his argument appears to be that section 5124 deprived him of a vested right without due process. We address this argument as presented.[9]

The cases dealing with the constitutionality of section 5124 are comprehensively reviewed in **In re Marriage of Carpenter** (1986) 188 Cal.App.3d 604, 613-617. The court there held that on the facts before it the statute did not work an unconstitutional impairment of contract, a deprivation of a vested right without due process, or a denial of equal protection. Nothing brought to our attention distinguishes husband's position from those rejected in **Carpenter** and the other cases upholding the statute. (E.g. **In re Marriage of Doud** (1986) 181 Cal.App.3d 510; **In re Marriage of Potter** (1986) 179 Cal.App.3d 73 (4,5,9); **Mueller v. Walker** (1985) 167 Cal.App.3d 600.)

Notably absent is any showing of legitimate reliance or a property. (See **In re Mariage of Bouquet** (1976) 16 Cal.3d 583, 592.) When husband first appeared in the action the governing law made the pension a community asset; his pleadings impliedly conceded that it was suoh an asset; and his pretrial statement assumed that wife would be awarded a shar= of the benefits. It is not suggested that some other portion of the property disposition was dependent on or affected by the court's initial decision to award the benefits entirely to husband. Under the circumstances, **McCarty** simply afforded husband an unexpected windfall which Congress and the Legislature acted promptly to take away. Husband has offered no coherent basis for holding that this was a violation of due process and similar legislation has been consistently upheld. (See Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking (1960) 48 Cal.Law Rev. 216, 238-243, and cases cited.)

Moreover, we follow **In re Marriage of Potter, supra**, 179 Cal.App.3d 73, 84, in rejecting the idea that FUSFSPA preempts section 5124. Section 5124 simply provides a local procedure for exercising the power conferred by FUSFSPA. Congress di: not purport to regulate such procedures and it would seem patently unreasonable to attribute to Congress an implied intent to preempt them when the manifest purpose of the statute was to foreswear preemption of local law. The sister-state cases cited by husband have no bearing on the question. (E.g., **Allison v. Allison** (Tex.App. 1985) 690 S.W.2d 340, 345 [expressly noting the absence of a "procedural mechanism" for reopening judqments final under Texas law]; **Breen v. Breen** (Tex.App. 1985) 693 S.W.2d 495, 496 [FUSFSPA did not empower court to reopen final judgment]) They merely apply their own law of the finality of judgments. They do not purport to hold that a state legislature is powerless to alter that law as it affects military pension rights.

The judgment is affirmed.[10]

SABRAW, J.

We concur:
ANDERSON, P.J.
POCHE, J.,

"(d) This section shall remain in effect only until January 1, 1986, and on that date is repealed unless a later enacted statute which is chaptered before that date deletes or extends that date."

2. The term "interlocutory judgment" is an evident misnomer since the judgment was apparently intended to resolve all remaining issues in the case. Were it otherwise we would lack jurisdiction over this appeal. (Code Civ. Proc., § 904.1, subd. (a)(1); see 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 8, p. 457 [appealability governed by effect, not label].)

3. Unless and until the judgment was entered, it was not effectual for any purpose, and remained subject to modification without regard to the foregoing limitations. (Code Civ. Proc., § 664; Phillips v. Phillips (1953) 41 Cal.2d 869, 874.) The record copy of the judgment bears no notation indicating entry. However, the clerk was required by law to enter the judgment immediately upon filing. (Code Civ. Proc., § 664.) We presume this duty was performed. (Evid. Code, § 664.) Neither party has suggested otherwise; and the clerk of this court has been informed by the clerk of the superior court that judgment was in fact entered on February 17, 1983.

4. Section 4513 provides: "In cases in which the court has determined that a decree of dissolution ought to be granted, but by mistake, negligence or inadvertence, the judgment has not been signed, filed and entered, the court may cause the judgment to be signed, dated, filed and entered therein as of the date when the same could have been signed, dated, filed and entered originally, if it appears to the satisfaction of the court that no appeal is to be taken in the action or motion made for a new trial, to annul or set aside the judgment or for relief under Chapter 8 (commencing with Section 469) of Title 6 of Part 2 of the Code of Civil Procedure . . . . The court may cause the judgment to be entered nunc pro tunc as aforesaid, even though the judgment may have been previously entered, where mistake [sic — read "through mistake"], negligence or inadvertence the judgment was not entered as soon as it could have been entered under the law if applied for. Upon the entry of the judgment, the parties shall have the same rights with regard to the dissolution of marriage becoming final on the date that it would have become final, had the judgment been entered upon the date when it could have been originally entered. [Etc.]"

5. Wife's papers below contained the statement that section 4513 was the sole authority for retroactive entry of the judgment, followed by a citation to Berry v. Berry (1956) 140 Cal.App.2d 50. This is somewhat puzzling since the Berry court expressly refrained from deciding whether the statutory remedy was exclusive. (140 Cal.App.2d at p. 54, 58.) Nonetheless, had the trial court ruled against wife her erroneous concession might be fatal to her cause. (See 9 Witkin, op. cit. supra, Appeal, § 316, p. 327 ["theory of trial" limitation on cognizable error.]) However, we do not believe wife's erroneous concession should operate to impeach an otherwise correct decision. (See Witkin, supra, § 322, pp. 333-333 ["the doctrine of theory of trial will often be disregarded in order to affirm, not reverse, the judgment"]; Escobedo v. Travelers Ins. Co. (1981) 197 Cal.App.2d 118, 127 ["a reviewing court is never bound by concessions of counsel as to the law"].)

6. It was held in a somewhat similar legal context that the enactment of statutes permitting entry of judgment after the death of a party did not do away with the common law rule authorizing nunc pro tunc relief in such situations. (Norton v. City of Pomona (1959) 5 Cal.2d 54, 63.)

7. Section 5124 had not yet been enacted when all this occurred. The enacting bill became law on September 14, 1983. (1983 Stats., ch. 775, p. 2852; Cal. Const., art. IV, § 10.)

8. "No one can take advantage of his own wrong." (Civ. Code, § 3517.)
"That which ought to have been done is to be regarded in favor of him to whom, and against him from whom, performance is due." (Civ. Code, § 3529.)

9. Husband does not contend that section 4324 as applied to him effected an unconstitutional impairment of contract. (See In re Marriage of Carpenter, infra, 188 Cal.App.3d 604. Indeed he affirmatively asserts that there is no contract governing the pension benefits.

Nor do we address the suggestion in some federal cases that legislative power may not extend to the invalidation of judgments which have become immune from direct attack. (See Hodges v. Snyder (1923) 261 U.S. 600, 603 ["the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation"]; McCullough v. Virginia (1896) 172 U.S. 102, 123-124 ["It is not within the power of a legislature to take away rights which have been once vested by a judgment"]; Mirabal v. General Motors Acceptance Corp. (7th Cir. 1978) 537 F.2d 871, 875-876 [rights conferred by legislation may be likewise revoked if they have not yet ripened into a judgment from which no further appeal may be taken]; de Rodulfa v. United States (D.C.Cir. 1972) 461 F.2d 1240, 1252-1253 [rule inapplicable where statutory change occurred while appeal pending]; I.A.M. National Pension Fund v. Wakefield Industries, Inc. (D.D.C. 1985) 612 F.Supp. 643, 646 [indicating that limitation derives from doctrine of separation of powers].) Such suggestions pose difficult issues which appellant has not seen fit to raise and which we decline to attempt to resolve in a vacuum.

10. Husband has not singled out for attack the portion of the judgment which awards wife a share of benefits already said to husband, and we express no view as to the propriety of that portion.

Trial Court:
Superior Court, County of Solano

Trial Judge:
Hon. Dwight C. Ely

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AFFIDAVIT OF SERVICE

I, R. Marie Marks, secretary to Dennis A. Cornell, attorney for Appellee, CAYE M. (MANSELL) FORBES, hereby certify that on November 13, 1987, I served copies of the foregoing MOTION TO DISMISS on the several parties hereto, as follows:

1. The Attorney General of the State of California by depositing a copy of the document in a United States mail box, with First Class Postage prepaid, addressed to Attorney General of the State of California, 350 McAllister Street, San Francisco, California 94102.

3. On GERALD E. MANSELL by depositing a copy of the document in a United States mail box, with First Class Postage pre-paid, addressed to his counsels of record, Jim T. Elia, 1330 L Street, Suite G, Fresno, California 93721, and Douglas B.

Cone, 720 Est 19th Street, Merced California 95340.

As a result of the foregoing, all parties required to be served have been served, pursuant to Supreme Court Rule 28.3 and 28.5(c).

R. Marie Marks

R. Marie Marks
1640 "N" Street, Suite 200
P. O. Box 2184
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Subscribed and sworn to before me, at Merced, California, this 13th day of November, 1987.

Jeannette M Fausone

My commission expires:

OFFICIAL SEAL
JEANNETTE M FAUSONE
NOTARY PUBLIC - CALIFORNIA
MERCED COUNTY
My comm. expires APR 8, 1988

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUN 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-201

In the Supreme Court of the United States

OCTOBER TERM, 1987

GERALD E. MANSELL, APPELLANT

v.

GAYE M. (MANSELL) FORBES

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The parties are former spouses. Appellant, a retired member of the Air Force, receives Air Force retirement pay and Veterans Administration (VA) disability benefits. In order to receive VA benefits, he has waived a portion of his Air Force retirement pay equal to the amount of the payments he receives from the VA.

The question is whether either the Federal Uniformed Services Former Spouses Protection Act, 10 U.S.C. (& Supp. IV) 1408, or the anti-attachment provision that applies to VA benefits, 38 U.S.C. 3101(a), requires that appellant's VA benefits be excluded in calculating appellee's community property interest in appellant's Air Force retirement pay.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-201

GERALD E. MANSELL, APPELLANT

v.

GAYE M. (MANSELL) FORBES

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. This case involves the relationship between California community property law and two kinds of federal benefits: military retirement pay based on length of service, and veterans disability benefits. Under various provisions of title 10 of the United States Code, members of the military services who have served the required length of time may retire from active duty and receive retirement pay. 10 U.S.C. 3911 *et seq.* (Army); 10 U.S.C. (& Supp. IV) 6321 *et seq.* (Navy and Marine Corps); 10 U.S.C. 8911 *et seq.* (Air Force); see generally *McCarty* v. *McCarty*, 453 U.S. 210, 213-215 (1981).[1]

[1] Separate provisions, not at issue in this case, govern retirement for disability. 10 U.S.C. (& Supp. IV) 1201 *et seq.* A member of the military service may become eligible for disability retirement before

In addition, veterans who become partially or totally disabled as a result of military service may be eligible for disability benefits from the Veterans Administration (VA) (38 U.S.C. 310 (wartime disability); 38 U.S.C. 331 (peacetime disability)). A military retiree may receive VA disability benefits only to the extent that he waives a corresponding amount of his military retirement pay (38 U.S.C. 3104(a)(1), 3105). Because VA disability benefits, unlike military retirement pay, are exempt from taxation, such waivers are common.

Under the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA), 10 U.S.C. (& Supp. IV) 1408, disposable military retirement pay may be regarded under state law as community property subject to division upon divorce (10 U.S.C. 1408(c)(1)). FUSFSPA in fact provides that the federal government will garnish up to 50% of a former spouse's disposable military retirement pay to satisfy a court order dividing the retirement pay as community property (10 U.S.C. (& Supp. IV) 1408(d)). VA disability benefits obtained pursuant to a waiver of a corresponding amount of military retirement pay, in contrast, are exempt from federal garnishment under FUSFSPA (10 U.S.C. 1408(a)(4)(B)).[2] In addition, VA disability benefits are protected by 38 U.S.C. 3101(a), which provides that such benefits "shall not be assignable except to the extent specifically authorized by law, and * * * shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable proceeding

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he is eligible to receive retirement pay based on length of service (see, *e.g.*, 10 U.S.C. 1201(3)(B)).

[2] Such VA disability benefits are, however, subject to garnishment under 42 U.S.C. (& Supp. III) 659 in order to meet alimony and child support obligations. See 42 U.S.C. 662(f)(2).

whatever, either before or after receipt by the beneficiary." See *Rose* v. *Rose*, No. 85-1206 (May 18, 1987); see also *Bennett* v. *Arkansas*, No. 86-6124 (Mar. 29, 1988) (Social Security Act anti-attachment clause).

b. California, like seven other States, applies community property principles to certain property acquired by the spouses during marriage. When a marriage is dissolved, the court granting the divorce decree divides the community assets equally between the spouses, while each spouse retains full ownership of any separate (that is, non-community) property. See Cal. Civ. Code § 4800(a) (West 1983); *McCarty* v. *McCarty*, 453 U.S. at 216-217; *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 577-578 (1979) (application of California community property law to Railroad Retirement Act pension)).

Under California law, vested rights to receive military retirement payments based on length of service are treated as community property to the extent that they derive from military service performed during the marriage. Military retirement pay received after a marriage is dissolved may therefore be subject to division between the former spouses on the theory that the right to receive those payments is a community asset that was acquired during the marriage. *Casas* v. *Thompson*, 42 Cal. 3d 131, 139, 228 Cal. Rptr. 33, 37, 720 P.2d 921, 925 (1986), cert. denied, No. 86-641 (Dec. 8, 1986); *In re Marriage of Fithian*, 10 Cal. 3d 592, 604, 111 Cal. Rptr. 369, 376, 517 P.2d 449, 456-457, cert. denied, 419 U.S. 825 (1974). Benefits based on disability, however, are considered to be compensation for the recipient's current impairment, not deferred compensation for prior services. California therefore treats disability payments received after the dissolution of a marriage as the separate property of the former spouse who receives them; this treatment as separate property applies to both military disability retire-

ment pay and VA disability benefits. *In re Marriage of Jones*, 13 Cal. 3d 457, 462-463, 119 Cal. Rptr. 108, 111-112, 531 P.2d 420, 423-424 (1975).

2. The parties to this appeal were married in 1954 and have six children. They separated in 1977. On May 29, 1979, the Merced County, California, Superior Court entered an interlocutory judgment dissolving the marriage. The dissolution order became final on June 4, 1979. J.S. App. D2. At the time of the divorce, appellant Mansell was retired from the Air Force on nondisability retirement, after having served the requisite time. He was also eligible for VA disability benefits based on a service-connected disability. He was then, and is now, receiving both Air Force retirement pay and, pursuant to a waiver of a portion of that pay, VA disability benefits. *Ibid.*[3]

On May 25, 1979, in preparation for the divorce, the parties entered into a property settlement agreement (J.S. App. D1). The agreement provided (*id.* at D2-D3) in part:

> [Appellant] shall make an allotment to [appellee] in an amount equalling fifty percent (50%) of the gross retirement pay and compensation from the Veterans' Administration accrued through [appellant's] employment with the United States Air Force, and shall increase such allotment from time to time in an amount necessary to equal fifty percent (50%) of the gross amount of any and all increases in such retirement pay and compensation from the Veterans' Administration that may occur in the future until the death of either party.

[3] The VA informs us that appellant receives approximately $482 per month in VA disability benefits and approximately $1,200 per month in Air Force retirement benefits.

The interlocutory divorce decree incorporated the property settlement agreement by reference (*id.* at A2), and also specifically required appellant to make the specified allotment of his gross retirement pay and VA disability benefits as provided for by the property settlement (*id.* at A3). The court that granted the divorce expressly reserved jurisdiction over the distribution of appellee's share of these benefits (*ibid.*). In addition, the decree noted that appellee had waived her right to receive any money or property from appellant as spousal support (*id.* at A2).

In 1983, appellant requested the Merced County Superior Court to modify the decree by removing the provision that required him to make the allotment of retirement pay and disability benefits (J.S. App. D2-D3). The superior court denied that request without opinion on August 10, 1983 (*id.* at B2).

Appellant appealed that decision to the California Court of Appeal, Fifth Appellate District, arguing that under FUSFSPA and 38 U.S.C. 3101(a), California could not include his VA disability benefits in the total retirement payments to be divided between him and appellee as community property. The Court of Appeal rejected the argument based on FUSFSPA, relying on the decision of the Supreme Court of California in *Casas* v. *Thompson*, 42 Cal. 3d 131 (1986) (J.S. App. D8-D11). *Casas* held that after the enactment of FUSFSPA there was no federal preemption of state community property law as it applies to military retirement pay, and that FUSFSPA's limited federal garnishment remedy did not imply any limits on the States' ability to subject military retirement pay to community property rights and to enforce those rights through remedies other than federal garnishment (42 Cal. 3d at 143-151). The Court of Appeal did not discuss the preemptive effect of 38 U.S.C. 3101(a). It affirmed the superior court's judgment on January 30, 1987 (J.S. App. D1-D14).

Appellant sought review of the Court of Appeal's decision in the Supreme Court of California. Review was denied without opinion on April 29, 1987 (J.S. App. E1).

DISCUSSION

Appellant asserts two grounds of federal preemption: FUSFSPA and the VA benefits anti-attachment provision (38 U.S.C. 3101(a)). We agree with the Court of Appeal that FUSFSPA does not forbid the application of California community property law to the gross amount of appellant's Air Force retirement pay, that is, to the full amount of retirement pay he would receive absent a waiver in order to obtain VA disability benefits. Appellant's claim based on Section 3101(a) presents a more difficult question. In our view, Section 3101(a) prevents appellee from reaching appellant's VA benefits in order to enforce her community property rights in the gross amount of appellant's retirement pay. This does not mean, however, that California may not enforce appellee's community property interest in appellant's gross retirement pay out of income available to appellant *other than* his VA disability benefits—including the balance of his military retirement pay not subject to federal garnishment.

We think that the preemption claim based on FUSFSPA is at least arguably a substantial federal question, and that the preemption argument grounded in Section 3101(a) is more clearly such a question. Accordingly, we suggest that probable jurisdiction be noted.

1. This Court has decided a series of cases involving claimed federal preemption of state community property and family support obligations. In *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), the former spouse of a railroad retiree claimed that California community property law gave her an interest in the retiree's benefits under the Railroad Retirement Act (RRA), 45 U.S.C. 231 *et seq.*

When *Hisquierdo* was decided, RRA benefits were protected by 45 U.S.C. (1976 ed.) 231m, an anti-attachment clause very similar to Section 3101(a).[4] The Court found that the RRA provided for "a specified beneficiary protected by a flat prohibition against attachment and anticipation" (439 U.S. at 582), and held therefore that the California courts could neither require the retiree to pay part of his benefits to his former spouse nor award her other property (in that case, the couple's house) as compensation for her right to RRA benefits (*id.* at 583-590).[5]

Subsequently, in *McCarty* v. *McCarty*, 453 U.S. 210 (1981), the Court concluded that federal law prevented California from applying its community property principles to nondisability military retirement pay. Although the military retirement statutes do not include an explicit preemption provision or anti-attachment clause, the Court found that Congress established military retirement pay as a personal entitlement of the retired service member and intended that retirement pay go to the retired member and to no one else (453 U.S. at 224-232). The Court accordingly determined that the application of California's community property law to military retirement pay was preempted (*id.* at 232-235).

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[4] The RRA anti-attachment clause, 45 U.S.C. (1976 ed.) 231m, provided: "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process * * * whatsoever, nor shall the payment thereof be anticipated * * *."

[5] After *Hisquierdo* was decided, Congress amended the RRA to permit states to treat railroad retirement benefits as community property. Railroad Retirement Revenue Act of 1983, Pub. L. No. 98-76, § 419(a), 97 Stat. 438; see 45 U.S.C. (Supp. III) 231m.

In direct response to *McCarty*, Congress enacted FUSFSPA, 10 U.S.C. (& Supp. IV) 1408. The Act provides that "[s]ubject to the limitations of this section, a court [with jurisdiction over a divorce [illegible]ee] may treat disposable retired or retainer pay * * * [illegible]ther as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court" (10 U.S.C. 1408(c)(1)). FUSFSPA further provides that the relevant uniformed service will make payments directly to a retired service member's former spouse in order to satisfy a court order dividing the retirement pay as community property or requiring that the service member provide child support or alimony (10 U.S.C. (& Supp. IV) 1408(d)). Garnishment by the federal government is limited to a specified portion (generally 50%) of the member's "disposable retired or retainer pay" (10 U.S.C. (& Supp. IV) 1408(e)(1)); "disposable retired or retainer pay" is in turn defined as "the total monthly retired or retainer pay to which a member is entitled," minus certain deductions (10 U.S.C. (& Supp. IV) 1408(a)(4)). Among the amounts to be deducted from the gross entitlement in calculating disposable retired pay are amounts waived in order to receive VA benefits under title 38 (10 U.S.C. 1408(a)(4)(B)).[6]

The Court recently considered the preemptive effect of the anti-attachment clause that protects VA benefits (38 U.S.C. 3101(a)) in *Rose* v. *Rose*, No. 85-1206 (May 18, 1987). *Rose* involved a Tennessee court order, under which appellant Rose, a disabled veteran, was required to support his children from a former marriage. Rose's

[6] The garnishment remedy under FUSFSPA is thus broader in its coverage than that provided by the Social Security Act, 42 U.S.C. (& Supp. III) 659, under which military retirement pay may be garnished in order to meet alimony and child support obligations but not in order to satisfy community property orders. See 42 U.S.C. 662(c).

income consisted entirely of VA and social security benefits, and his social security payments were insufficient to meet his support obligations. He would thus have to make payments out of his VA benefits in order to comply with the support order. The Court rejected Rose's argument that Section 3101(a) prohibited the Tennessee courts from holding him in contempt in order to enforce his support obligations. The Court reasoned that VA disability benefits were "intended to support not only the veteran, but the veteran's family as well," and concluded on that basis that Section 3101(a) "does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support" (slip op. 13). The Court specifically noted, however, that it was dealing with a child support order, not a community property division (*ibid.*).

2. Appellant receives both Air Force retirement pay and VA disability benefits. The retirement pay he actually receives reflects his waiver, pursuant to 38 U.S.C. 3105, of an amount of retirement pay equal to his VA disability compensation. Appellee maintains that under California law she owns, as community property, 50% of the gross Air Force retirement pay that appellant is entitled to receive as a result of his military service, and that her community property interest is not affected by appellant's waiver of part of that entitlement in order to receive VA benefits instead. Appellee does not, however, assert any direct interest in appellant's VA disability benefits, which in any event are considered his separate property under California law (Mot. to Dis. 9-10, 13-14). She also recognizes (see *id.* at 13) that her garnishment remedy under FUSFSPA does not reach the portion of appellant's retirement pay that he has waived in order to receive VA disability benefits. Appellee nevertheless maintains (*ibid.*) that she may use other remedies to enforce her

interest in one half of appellant's gross entitlement to retirement pay.

Appellant argues that federal law preempts appellee's community property interest in his gross military retirement pay two ways. First, he suggests (J.S. 7-9) that FUSFSPA, in addition to creating a federal garnishment right limited to 50% of disposable retired pay, also limits appellee's community property rights to the amount she can collect through federal garnishment. Next, appellant maintains (*id.* at 9-11) that, despite any interest appellee may have in his Air Force retirement pay, the anti-attachment clause that protects VA disability benefits (38 U.S.C. 3101(a)) preempts California community property law to the extent that it would apply to the amount of Air Force retirement pay that he has waived in order to receive VA benefits.

a. Appellant's first argument would directly limit appellee's community property interest in his Air Force retirement pay to the amount she could garnish under FUSFSPA. The argument rests on the premise that part of the federal preemption of state community property law recognized in *McCarty* v. *McCarty, supra*, survives the enactment of FUSFSPA. According to appellant (J.S. 7), FUSFSPA "did not give California the unlimited right to treat military retirement pay in accordance with its general community property laws. It merely provided for division of 'disposable retired pay,' as opposed to gross retired pay."

In our view, the Supreme Court of California in *Casas* v. *Thompson, supra*, correctly rejected that contention. FUSFSPA provides (10 U.S.C. 1408(e)(6) (emphasis added)):

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support *or other payments* required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted * * *. Any such unsatisfied obligation of a member may be enforced by any means available under law * * *."

FUSFSPA thus disclaims any preemptive effect of its own, while expressly contemplating state-law obligations in excess of those that may be enforced through federal garnishment. This express permission for enforcement of obligations in excess of those that can be collected through federal garnishment is inconsistent with the conclusion that any aspect of federal law other than FUSFSPA itself preempts the application of state community property law to federal military retirement.[7]

The legislative history confirms this view. FUSFSPA, which ultimately was adopted as part of a Department of Defense authorization statute (Department of Defense Authorization Act, 1983, Pub. L. No. 97-252, Tit. X, § 1001, 96 Stat. 730), originated as a Senate bill. S. 1814, 97th Cong., 1st Sess. (1981). The report on S. 1814 explained (S. Rep. 97-502, 97th Cong., 2d Sess. 16 (1982)): "The provision is intended to remove the federal preemption found to exist by the United States Supreme Court [in *McCarty*] and permit State and other courts of competent jurisdiction to apply pertinent State or other

[7] Appellant implies (J.S. 8 (emphasis in original)) that FUSFSPA has preemptive, as well as anti-preemptive, effect because it provides that "*[s]ubject to the limitations in this section*, a court may treat disposable retired or retainer pay * * * either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court" (10 U.S.C. 1408(c)(1) (emphasis added)). The limitations referred to, however, are spelled out in the remainder of Section 1408(c). They include the proviso that the FUSFSPA garnishment right, unlike a normal community property right, does not descend (10 U.S.C. 1408(c)(2)); there is no suggestion, however, that the limiting language in any way contradicts the express savings clause contained in Section 1408(e)(6).

laws in determining whether military retired or retainer pay should be divisable." The Senate Report also notes that the limitation on garnishment under FUSFSPA does not limit any other remedy available to enforce state-created rights (*id.* at 11).[8]

We conclude, therefore, that the military retirement statutes do not displace state community property law as it relates to military retirement pay based on length of service.

b. Appellant also argues that Section 3101(a) prevents California from treating as community property that portion of his Air Force retirement pay that he has waived in order to receive VA disability benefits. This contention presents two questions: first, whether Section 3101(a) applies to claims arising out of community property rights, and second, if the provision does apply, whether it requires the result appellant urges.

The Court held in *Hisquierdo* that the anti-attachment clause of the RRA prevented a former spouse from enforcing a community property interest in benefits protected by the anti-attachment clause. In *Rose*, however, the Court held that Section 3101(a) did not preclude the enforcement of a state order of child support. The Court concluded that claims based on such family obligations are not claims of the sort to which Section 3101(a) applies. *Rose* therefore raises the question whether Section 3101(a) has

[8] Appellant also suggests (J.S. 11) that his preemption argument finds support in the Social Security Act, which authorizes attachment of military retirement pay, including portions thereof waived in order to receive VA disability benefits, in order to satisfy alimony and child support obligations but not in order to satisfy community property obligations (42 U.S.C. (& Supp. III) 659, 662(f)(2)). Like FUSFSPA itself, however, those provisions reflect limits on the federal government's willingness directly to enforce state-created obligations, not affirmative preemption of state law.

any application to appellee's claim, which arises out of her community-property interest in appellant's Air Force retirement pay.

In our view, the rationale of *Rose* does not affect the application of Section 3101(a) to claims based on community property rights. *Rose* turned on the Court's conclusion that VA benefits "are intended to 'provide reasonable and adequate compensation for disabled veterans *and their families*.' S. Rep. No. 98-604, p. 24 (1984) (emphasis added)." Slip op. 10. The Court in *Rose* distinguished its prior cases, including *Hisquierdo*, involving federal preemption of state community property law (*id.* at 11-13), noting that those cases had expressly distinguished between "the moral imperative of family support obligations and the business-like justifications for community property division" (*id.* at 13; see also *id.* at 11).

Community property rights and support obligations are different not only in form but in substance, as has been repeatedly recognized by both the Court (see *e.g.*, *Wissner* v. *Wissner*, 338 U.S. 655, 659-660 (1950)) and Congress (see, *e.g.*, 42 U.S.C. (& Supp. III) 659 (benefits attachable to satisfy child support and alimony, but not community property, obligations); 11 U.S.C. (& Supp. IV) 523(a)(5) (discharge in bankruptcy releases community-property, but not support, obligations)). Community property rights accrue automatically during a marriage and rest on certain assumptions concerning the creation of wealth and the use of that wealth to acquire property. Spousal and child support obligations, by contrast, rest on the legal and moral undertakings implicit in marriage and parenthood. The two kinds of rights thus differ in their origins, purposes and proper measure—in particular, support obligations are calculated on the basis of need, which does not enter into the determination of community property interests. The distinction is genuine even though community property interests may to some extent reflect the need for

support and may sometimes represent a substitute for support obligations. See *Wissner*, 338 U.S. at 660 n.4.

However, the conclusion that Section 3101(a) applies to claims arising out of community property obligations, as opposed to family support obligations, does not dispose of this case. Unlike the former spouse in *Hisquierdo*, appellee does not assert a direct interest in appellant's protected benefits; she recognizes that California law gives her no such interest. Rather, appellee maintains (Mot. to Dis. 9-14) that under California law appellant's waiver of a portion of his Air Force retirement pay does not defeat her right to receive 50% of his gross entitlement to Air Force retirement pay, including the amount he has waived.[9] This case therefore presents a novel question under Section 3101(a): whether the anti-attachment clause protects funds received from a specific source—Veteran's disability payments—or whether it also protects the beneficiary's total wealth, from whatever source it may be derived.

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[9] In *In re Marriage of Jones*, 13 Cal. 3d at 461-462, 119 Cal. Rptr. 111-112, 531 P.2d 423-424, the Supreme Court of California held that military disability retirement pay, received by a service member who took disability retirement before he became eligible for retirement based on length of service, was the member's separate property, not community property. *Jones* stated that VA disability benefits, as well as military disability retirement pay, would be the separate property of a former spouse after the marriage was dissolved (13 Cal. 3d at 462 n.5, 119 Cal. Rptr. 112 n.5, 531 P.2d 424 n.5). Where the service member was able to elect either disability or nondisability retirement, however, the California courts have held that the election to take disability retirement does not defeat the former spouse's community-property interest in the vested right to receive non-disability retirement pay that the retired service member has waived. In order to enforce the former spouse's rights, a constructive trust is imposed on the disability retirement benefits. *In re Marriage of Stenquist*, 21 Cal. 3d 779, 148 Cal. Rptr. 9, 582 P.2d 96 (1978); see also *In re Marriage of Mastropaolo*, 166 Cal. App. 3d. 953, 213 Cal. Rptr. 26 (1985), cert. denied, 475 U.S. 1011 (1986).

In our view, Section 3101(a) protects funds derived from a specific source. The statute prevents appellee from invading appellant's VA benefits in order to satisfy her claim to a share of his Air Force retirement pay. By its terms Section 3101(a) exempts VA payments from the claims of creditors and shields them from any form of "attachment, levy, or seizure by or under any legal or equitable process whatever, *either before or after receipt by the beneficiary*" (emphasis added). Accordingly, appellant's VA benefits themselves are unavailable to appellee, either directly or through the imposition of a constructive trust (see *Ridgway* v. *Ridgway*, 454 U.S. 46 (1981)), just as they are unavailable to any other creditor of appellant. See *Bennett* v. *Arkansas*, No. 86-6124 (Mar. 29, 1988) (anti-attachment provision of Social Security Act, 42 U.S.C. (& Supp. III) 407(a), prevents State from attaching social security benefits in order to pay expenses of state prisoner).

This does not mean, however, that Section 3101(a) prevents appellee from recovering her asserted 50% interest in appellant's gross Air Force retirement entitlement out of *other* income or assets of appellant—including his Air Force retirement pay. In this case, appellant's net Air Force retirement pay appears to be sufficient to satisfy appellee's entire claim to 50% of his gross entitlement, without requiring that he make any payment out of his VA benefits. See note 3, *supra*.

Appellant contends that Section 3101(a) goes farther than protecting his VA payments themselves, and that it in effect insulates a certain portion of his wealth from the claims of his former spouse. Specifically, he maintains that because of the anti-attachment provision, the portion of his Air Force retirement pay which is subject to appellee's community property rights must be reduced by an amount equal to his VA disability benefits. However, neither the language nor the purpose of Section 3101(a)

requires that appellee's rights be reduced because of appellant's waiver of some of his Air Force retirement pay. Calculation of appellee's interest on the basis of appellant's gross Air Force retirement entitlement does not in itself constitute an "attachment" of VA benefits or otherwise subject them to a creditors' claims, as long as the benefits themselves are protected. Moreover, the purpose of Section 3101(a) is fully achieved as long as appellant is able to receive the VA benefits tax-free and the benefits themselves are protected from diminution by the anti-attachment provision.[10] Section 3101(a) is designed to ensure that the needs of the disabled veteran, as represented by the amount of his disability compensation, are met, without any interference from creditors. That design is effective as long as the full amount of VA benefits is available to the beneficiary.

The approach we suggest is in keeping with that indicated by the Court in *Ridgway* v. *Ridgway, supra*. In *Ridgway*, a former service member was required by a state court order to maintain in force a military insurance policy which named his former wife and children as beneficiaries. The service member, however, remarried and named his new wife as beneficiary under the policy before he died. The Court held that because of the service member's unqualified federal right to name the beneficiary of the policy, reflected in an anti-attachment clause (38 U.S.C. 770(g)), his children could not attach the proceeds of the policy. The Court suggested, however, that the children might have a valid claim against any other assets in the

[10] Because VA benefits are tax-free, appellant's waiver of Air Force retirement pay in favor of VA benefits increases his net income. Under the analysis we propose, this increase in appellant's net benefits does not affect appellee's interest, because it does not affect his gross entitlement to Air Force retirement; appellant therefore captures the full benefit of the tax exemption.

estate as a result of the decedent's breach of his obligation to insure them (454 U.S. at 59). Similarly here, Section 3101(a) protects appellant's VA benefits but not his other income and assets, which are available to satisfy appellee's otherwise valid state-law claims.[11]

3. Although the California Court of Appeal reached the correct result in this case, we believe that this appeal presents substantial federal questions and therefore should be given plenary consideration.[12] The question whether FUSFSPA completely eliminates any and all federal preemption of state community property laws as they apply to military retirement pay is of considerable practical importance. While the Court might conclude that the decision of the Supreme Court of California in *Casas* v. *Thompson, supra*, on which the Court of Appeal in this

[11] This result is also consistent with *Free* v. *Bland*, 369 U.S. 663 (1962), in which the Court held that federal survivorship rules governing the descent of United States Savings Bonds preempted a Texas community-property rule that purported to control the descent of the money with which the bonds had been purchased. There, the Court held that in the absence of fraud, the use of community assets to purchase the bonds did not subject the bonds to the state rule of descent. The Court found preemption in *Free*, however, because of an irreconcilable conflict between state community property law and the rule of descent specifically provided by federal law. Here, as we have explained, Section 3101(a) can be fully effective without displacing state law.

[12] This case is properly within the Court's appellate jurisdiction. Appellant maintains in this Court, and represents (see J.S. 4-5) that he argued below, that both FUSFSPA and Section 3101(a) prevent the application of California community property law to a portion of his federal benefits. The Court of Appeal specifically addressed the question of preemption, albeit only under FUSFSPA (J.S. App. D8-D11). See *McCarty*, 453 U.S. at 219-220 n.12 (challenge to California community property law correctly reviewed on appeal, not certiorari); see also *Rose* v. *Rose, supra* (appeal from Court of Appeals of Tennessee). Appellee does not argue that this is not an appeal.

case relied, was so clearly correct as to make the federal question insubstantial, the issue involves the construction of an Act of Congress which was passed in response to a decision of this Court, and which has not received an authoritative resolution at the federal level. Given the large number of persons affected by the statute, we think that such a resolution would be desirable.

The effect of the VA anti-attachment clause on claims deriving from community-property rights is also a federal question of considerable practical importance, and is, in our view, somewhat more difficult. This Court's decision in *Rose*, holding that 38 U.S.C. 3101(a) does not prevent the enforcement through contempt proceedings of child support obligations, raises the question whether that statute affects the enforcement of community property rights. Moreover, the suggestion that Section 3101(a) in effect gives appellant the right to reduce appellee's community property entitlement, although we believe it to be incorrect, raises a difficult federal question.

Appellee argues (Mot. to Dis. 14-17) that the Court should dismiss the appeal because the parties characterized appellant's gross Air Force retirement pay as community property in a stipulated judgment. That fact, however, does not appear to have any bearing on the jurisdiction of this Court. It certainly does not represent an independent and adequate state ground for the decision below, since the Court of Appeal rejected the argument that appellant could not seek review of the earlier stipulated judgment (J.S. App. D6-D8). The California court reached the merits of the federal claim and did not rely on a state ground.[13]

[13] Alternatively, appellee may mean to suggest that her claim to a portion of appellant's benefits rests on contract as well as on community property law, on the theory that a stipulated judgment, like a consent decree, is in part a contract. The Court of Appeal did not suggest that it had a considered any such approach. Moreover, in order to accept that argument it would be necessary to conclude that Section 3101(a) does not prevent the enforcement of a contractual obligation that is calculated on the basis of VA disability benefits; that conclusion would involve the resolution of a federal question and so would not be purely a matter of state law.

In sum, this case involves significant federal questions, at least one of which was not addressed by the state courts, which warrant full consideration by this Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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APPELLANT'S

BRIEF

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No.87-201

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

GERALD E. MANSELL, Appellant

v.

GAYE M. (MANSELL) FORBES, Appellee

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

Appellant's Brief on the Merits

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QUESTION PRESENTED

Whether California may characterize Veterans Administration Disability Benefits as property and divide the benefits as community property upon dissolution of marriage despite the anti-attachment protections of 38 U.S.C. §3101.

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OPINIONS BELOW

Interlocutory Judgment of Dissolution of Marriage filed May 29, 1979 (Clerk's Transcript, Pages 3 to 5 [C.T. 3-5], set forth in full in the Jurisdictional Statement, Appendix A [J.S. App.A]).

Denial of Appellant's Motion for Modification of Judgment (C.T.93, J.S.App.B).

Denial of Reconsideration (C.T.94, J.S.App.C).

California Court of Appeal Opinion (J.S.App.D).

California Supreme Court denial of Review (J.S.App.E).

None of the decisions of the courts below are officially reported.

JURISDICTIONAL GROUNDS

Under the Supremacy Clause, United States Constitution, Article VI, Clause 2, federal law must prevail. However, the California courts have refused to acknowledge that 38 U.S.C. §3101 prevents the states from awarding Veterans Administration Disability Benefits to former wives as community property, even though this court has held that the exact same language as §3101, as well as other similar federal statutes, absolutely pre-empts the state power to treat these federal benefits as community property.

This appeal was docketed on July 27, 1987, which was within 90 days of the California Supreme Court's denial on April 29, 1987, of the appellant's Petition for Review.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(2). The Court noted probable jurisdiction on June 27, 1988.

STATEMENT OF THE CASE

The marriage of the parties was dissolved by an Interlocutory Judgment of Dissolution of Marriage filed May 29, 1979 (J.S.App.A). Paragraph 6 of the Judgment provides:

> "6. Respondent [husband] shall make an allotment to Petitioner [wife] in an amount equaling fifty percent (50%) of the gross retirement pay and compensation from the Veterans Administration accrued through Respondent's employment with the United States Air Force, * * * "

On May 13, 1983, Major Mansell filed a motion to modify the judgment by deletion of paragraph 6 (C.T.40). He argued, *inter alia*, that under the Supremacy Clause of the United States Constitution, the states were precluded

from disposing of Veterans Administration (V.A.) Disability Benefits by Title 38 U.S.C. §3101 (C.T.41). The trial court denied, without a statement of decision, the motion for modification (J.S.App.B) and a motion for reconsideration (J.S.App.C).

Major Mansell then appealed to the California Court of Appeal for the Fifth Appellate District. Once again, he argued that the state courts did not have jurisdiction over V.A. Disability Benefits because 38 U.S.C. §3101 pre-empted the state's ability to award V.A. Disability benefits as community property (Appellant's Opening Brief in the California Court of Appeal, pages 7 and 8).

Mrs. Forbes argued that it was too late for her ex-husband to appeal and that he could not appeal because the original judgment was founded upon a stipulation. The Court of Appeal rejected both of these arguments and decided the case on the merits (J.S.App.D.pp.6 to 8). Mrs. Forbes did not cross-appeal on either issue.

The Califo a Court of Appeal rejected Major Mansell's challenge on January 30, 1987, and affirmed the trial court's decision (J.S.App.D). The great bulk of the Appellate Court Opinion is devoted to a discussion of this Court's decision in *McCarty v. McCarty* 453 U.S. 210 (1981), and how it was affected by 10 U.S.C. §1408 (FUSFSPA). The Appellate Court also briefly addressed some of the other issues raised by the Appellant. However, the Opinion is silent concerning federal pre-emption under 38 U.S.C. §3101 (J.S.App.D).

Major Mansell then sought review in the California Supreme Court. In his Petition he tried to focus the Supreme Court's attention on the pre-emption issue by expressly limiting his argument to the proposition that division of V.A. Disability Benefits as community property violates 38 U.S.C. §3101. However, the California Supreme Court refused to hear the case and, on April 29, 1987, denied Review. The California Supreme Court did not issue an opinion (J.S.App.E). Therefore, the Court of Appeal Opinion is the final state action available to the Appellant.

Major Mansell filed a timely notice of appeal on May 29, 1987 (J.S.App.F). The case was docketed on July 27, 1987, and this court noted probable jurisdiction on June 27, 1988.

SUMMARY OF ARGUMENT

When state action is in conflict with a direct pronouncement of federal law, the state act is invalid. And, this is true even if the state moves in an area of its general competence, such as domestic relations cases (*Ridgway v. Ridgway*, 454 U.S. 46 (1981)).

In the present case, Major Mansell was forced to waive a portion of his military longevity retirement in order to receive disability compensation from the V.A. (38 U.S.C. §3105). The monthly disability benefit is not based on any particular period of service, but rather is a flat sum determined on the basis of the percentage of disability and unemployability (38 U.S.C. §§314 and 355). As a recipient

of V.A. disability benefits, Major Mansell contends that he is fully protected by the anti-attachment provisions of the Veterans' Benefits Act (38 U.S.C. §3101), which shields disability benefits from any legal process, except for child support (*Rose v. Rose*, 481 U.S. ___, 107 S.Ct. 2029 (1987)).

Congress has positively required, by direct enactment, that the disabled veteran actually receive the disability benefits. The passage of the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA), Pub. L. No. 97-252, Tit. X (1982) (10 U.S.C. §1408) did nothing to change the protections of the Veterans' Benefits Act.

FUSFSPA did not give California the unlimited right to treat military retirement benefits in accordance with its general community property laws. Congress merely granted the states a limited right to divide "*disposable retired pay*." Section (a)(4) of the Act removes any ambiguity as to the meaning of "*disposable*" by expressly defining what the state courts may divide. Congress unequivocally stated and intended to exclude from division by the state courts those "*amounts waived in order to receive compensation under * * * Title 38.*"

Title 38 provides for compensation for a disability contracted in the line of duty. In the present case, Major Mansell was granted disability benefits under Title 38 and was required to waive a portion of his military longevity retirement in order to receive disability benefits (38 U.S.C. §3105). Since there is no ambiguity in §1408(a)(4)(B), the amount that Major Mansell receives as V.A. disability

benefits must be subtracted from the total retirement benefits before the state can divide the remaining "*disposable retired pay*."

Congress has developed a comprehensive set of statutes to care for this country's veterans (Title 38, U.S.C.). Every time Congress has developed a new program or modified an existing program that might impact the disabled veteran, it has included specific provisions for the continued protection of those who have forfeited their health or physical capabilities in the service of their country. For instance, the Social Security Act creates an exemption from federal immunity for attachment of federal pay, including military pay, for child support and alimony (42 U.S.C. §659). However, community property is specifically excluded from the definition of alimony (42 U.S.C. §662[c]).

Congress permits garnishment of Civil Service retirement benefits for community property purposes (5 U.S.C. §8345(j)). And, Congress allows garnishment of Foreign Service retirement for community property division (22 U.S.C. §§4044 et seq.). Nevertheless, Congress, presumably for good and sufficient reasons, has enacted no comparable provision for benefits payable by the Veterans Administration.

This contention finds added support in the provision of a separate benefit for a veteran's dependent spouse (38 U.S.C. §315), a benefit which terminates on the last day of the calendar month in which an annulment or divorce occurs (38 U.S.C. §3012[b][2]). Until Congress

chooses to act, its present anti-attachment policy, as expressed in the Veterans' Benefits Act, FUSFSPA, and the Social Security Act, is controlling.

FUSFSPA allows the states to "*treat*" (characterize) some portions of military longevity retirement pay as property. Nevertheless, and in spite of Mrs. Forbes' claims, FUSFSPA does not change the character of these federal benefits. Military retirement pay is reduced compensation for reduced service (*U.S. v. Tyler*, 105 U.S. 244 (1882)). Virtually every federal court that has examined the issue has held that military retired pay is other than a property right (see e.g., *Costello v. U.S.*, 587 Fed.2d 424 (9th Cir., 1978) cert. den. 442 U.S. 929 (1979)), so it cannot be community property.

California's division of military retirement benefits as vested property forces an unconstitutional application of FUSFSPA. Redirecting retirement benefits, as vested property due for services already performed, from the retired member to whom it belonged in its entirety under federal law (*McCarty v. McCarty*, 453 U.S. 210 (1981)), represents an impermissible taking of a settled interest (*U.S. v. Larionoff*, 431 U.S. 864, 879 (1977)). It would be no less of a "taking" than if Congress had directed that the reduced amount be retained in the Treasury.

In the instant case, the California court held that military retirement benefits are actually vested property (J.S. App. D-10). Since Congress has allowed retroactive taking of the benefits without compensation, FUSFSPA is invalid under California's application of the statute. If

FUSFSPA actually alters vested rights, the act denies due process of law by taking the property of one and bestowing it upon another (*Railroad Retirement Board v. Alton Railway Co.*, 295 U.S. 330, 350 (1935)). However, this constitutional problem with FUSFSPA does not arise if the retirement benefits are current compensation for current reduced services because Congress may prospectively reduce the pay of servicemen (*Larionoff*, 431 U.S. at 880).

California's division of veteran's disability benefits also constitutes a "seizure" prohibited by the anti-attachment provisions of 38 U.S.C. §3101 (*Wissner v. Wissner*, 338 U.S. 655 (1950)). The state court's attempt to limit the anti-attachment provisions because of equitable interests violates the unqualified sweep of the statute. Section 3101 prohibits, in the broadest of terms, any "*attachment, levy, or seizure by or under any legal or equitable process whatever*," even after receipt by the disabled veteran (*Ridgway v. Ridgway*, 454 U.S. 46 (1981)).

Like anti-attachment provisions generally, §3101 ensures that the benefits are actually received by the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process, notwithstanding any other law of any state. It prevents the vagaries of state law from disrupting the national scheme and guarantees a national uniformity that enhances the effectiveness of Congressional policy.

Mrs. Forbes apparently claims that this Court does not have the right to interfere with the judgment below because it is founded upon a stipulation (Motion to Dismiss

[M.D.], p.14). She also claims that there is no precedent for interfering with stipulated judgments (M.D., p.15). However, the Court has already settled both of these questions when it said:

> "We find nothing to indicate that Congress intended to exempt claims based on property settlement agreements from the strong language of the anti-attachment provision." (*Ridgway*, 454 U.S. at 62).

Additionally, the California court may not make an offsetting award from other assets (*Wissner*, 338 U.S. at 659). To do so would, in effect, anticipate the benefit in violation of the statute, just as would awarding a house or other property as an offset (*Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588-589), and as imposition of a constructive trust would operate as a forbidden "seizure." (*Ridgway*, 454 U.S. at 60).

Congress intended V.A. disability benefits to remain the separate entitlement of the disabled veteran. Under the Supremacy Clause, California's community property laws must defer to the specific provisions of the Veterans Benefits' Act (38 U.S.C. §3101) designed to protect those benefits. Consequently, former spouses have no community property interest in the member's military disability benefits. To the extent that the state judgment purports to award these benefits to Mrs. Forbes, it is void.

ARGUMENT

I
COMMUNITY PROPERTY DIVISION OF V.A. DISABILITY BENEFITS VIOLATES 38 U.S.C. §3101, WHICH POSITIVELY REQUIRES THAT DISABLED VETERANS ACTUALLY RECEIVE THE BENEFITS

When state action is in conflict with a direct pronouncement of federal law, the state act is invalid. And, this is true even if the state moves in an area of its general competence, such as domestic relations cases. As the Court pointed out in *Ridgway v. Ridgway*, 454 U.S. 46 (1981):

> "Notwithstanding the limited application of federal law in the field of domestic relations generally, (see *McCarty v. McCarty*, 435 U.S. 210, 101 S.Ct. 2728, 2735, 69 L.Ed.2d 589 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *In re Burrus*, 136 U.S. 586, 593-594 (1890)), this court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in federal rights. *** And, specifically, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." (*Ridgway*, 454 U.S. at 54-55).

Pre-emption by the federal government, quite simply, deprives state courts of subject matter jurisdiction and this has been so from the earliest days of our country. In *McCulloch v. Maryland*, 4 Wheat 316 (1818), Chief Justice Marshall construed the Supremacy Clause as the bulwark of national power when he declared:

> "The states have no power by taxation or otherwise, to retard, impede, burden, or any manner control the operation of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government." (4 Wheat at 463).

Since *McCulloch*, if a state action is seen to be incompatible with any legitimate exercise of power by the federal government, it loses all claim of validity--and this is true even though the state action in question was taken within a sphere in which the states could otherwise act (*Free v. Bland*, 369 U.S. 663, 666 (1962)).

The Court has noted that it should exercise care for state interests, particularly in the area of family and family-property arrangements. These interests should be overridden only where clear and substantial federal interests, *which cannot be served consistently with respect for such state interests*, will suffer major damage if the state law is applied (*U.S. v. Yazell*, 382 U.S. 341, 352 (1966), [state coverture law defeats government's conflicting contract claim]). Nevertheless, the Court has, on many previous occasions, considered direct conflicts between federal law and state community property laws, and each time resolved the conflict in favor of federal pre-emption (*McCune v. Essig*, 199 U.S. 382 (1905); *Wissner v. Wissner* 338 U.S. 655 (1950); *Free v. Bland*, 369 U.S. 633 (1962); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *McCarty v. McCarty*, 453 U.S. 210 (1981)). The Court pointed out in *Yazell*, there is

"no federal law relating to the protection of the separate property of married women." (382 U.S. at 353). However, the present case is different. There is an entire body of federal law protecting veterans' benefits--Title 38, U.S.C. Thus, there is a clear and substantial federal interest which cannot be served if state community property law intercepts the benefits.

In the present case, Major Mansell waived a portion of his military longevity retirement in order to receive disability compensation from the V.A. (38 U.S.C. §§310 and 3105). The monthly benefit is not based on any particular period of service, but rather is a flat sum determined on the basis of his percentage of disability and impairment of his earning capacity (38 U.S.C. §§314 and 355). As a recipient of V.A. disability benefits, Major Mansell contends that he is fully protected by the anti-attachment provisions of the Veterans' Benefits Act (38 U.S.C. §3101), which shield disability benefits from any legal process, except for child support (*Rose v. Rose*, 481 U.S. ___, 107 S.Ct. 2029 (1987).

Section 3101(a) states:

> "(a) Payment of benefits due or to become due under any law administered by the Veterans Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and **shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary**. The preceding sentence

> shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments * * *" (*emphasis added.*)

Language identical to the phrase highlighted above, word for word, was involved in the case of *Wissner v. Wissner*, 338 U.S. 655, 659 (1950), and again in the case of *Ridgway v. Ridgway*, 454 U.S. 46, 52-53 (1981). The *Wissner* Court held that the language prevented the state from applying community property law to reach the federal benefits. And, the diversion of future payments to be received by the beneficiary would be a "seizure" prohibited by the anti-attachment provision (*Wissner*, 338 U.S. at 659). The *Ridgway* Court, commenting on *Wissner*, said "*These are strong words and a positive ruling.*" (454 U.S. at 55).

> "Venerable and worthy as this community [the business relationship of man and wife] is, it is not, we think, as likely to justify an exception to the congressional language as specific judicial recognition of particular needs, in the alimony and support cases." (*Wissner*, 338 U.S. at 660).

Thirty-seven years later, the Court had occasion to comment further on the distinction between support and community property claims. In *Rose v. Rose*, 481 U.S. ___, 107 S.Ct. 2029 (1987), the Court found an exception to the application of Section 3101's prohibition against attachment, levy, or seizure in a *context of child support*. The Court found that the federal purpose would be furthered

by allowing the disability benefits to provide support for the disabled veteran's children. The *Rose* court concluded:

> "Therefore, regardless of the merit of the distinction between the moral imperative of family support obligations and the *business-like justifications for community property division*, we conclude that §3101(a) does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support." (481 U.S. at ___).

The *Rose* Court also discussed the exception to anti-garnishment statutes for alimony and child support in a context of *community property*.

> "Consistent with the distinction suggested in *Wissner v. Wissner*, 338 U.S. 655 (1950), Congress had amended the Social Security Act to authorize garnishment of certain federal benefits, including railroad retirement annuities, for spousal and child support **but not for community property divisions**. 42 U.S.C. §§659 and 662. We construed these amendments to 'expressly override' the anti-attachment provisions for support claims, finding it 'logical to conclude that Congress * * * thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals, but that **community property claims, which are not based on need, could not do so.**'" (*Rose*, 481 U.S. at ___, n. 6)(*emphasis added*).

In the present case, the dispute is whether the anti-attachment provision of the Veterans' Benefits Act protects Major Mansell's V.A. disability benefits from the

community property claims of Mrs. Forbes. There is no issue of child support or alimony.[1] Thus, in keeping with the consistently uniform decisions of the Court, and consistent with the direct enactment of Congress, Major Mansell's disability benefits are protected by the anti-attachment provisions of 38 U.S.C. §3101.

Congress has positively required, by direct enactment, that the disabled veteran actually receive the disability benefits. The passage of the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA), Pub.L.No.97-252, Tit.X (1982) (10 U.S.C. §1408) did nothing to change the protections of the Veterans' Benefits Act.

FUSFSPA did not give California the unlimited right to treat military retirement benefits in accordance with its general community property laws. Congress merely granted the states a limited right to divide "*disposable retired pay*." Congress unequivocally stated and intended to exclude from division by the state courts those "*amounts waived in order to receive compensation under * * * Title 38.*"

The fact that under California law Congress could have allowed the states to divide all of the retired servicemen's benefits is of no moment. As the Court pointed out in *Ridgway v. Ridgway*, 454 U.S. 46 (1981):

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1. The settlement agreement provided that Major Mansell would have custody of the minor child of the parties, but that his ex-wife would not be required to pay child support (M.D.App.C-12,para.R). Mrs. Forbes waived spousal support (M.D.App.C-12,para.Q).

> "[t]he relative importance to the state of its own law is not material when there is a conflict with a valid federal law, for the framers of our constitution provided that the federal law must prevail." (*Ridgway*, 382 U.S. at 54-55).

What is important in the present case is the meaning and effect of FUSFSPA and its relationship with the anti-attachment provisions of the Veterans' Benefits Act. The Uniformed Services Former Spouses Protection Act (FUSFSPA) fully supports husband's contention that V.A. disability compensation may not be divided as community property. Section 1408(c)(1) provides:

> "**Subject to the limitations of this section**, a court may **treat disposable retired or retainer pay** payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (*Emphasis added*).

There can be no doubt that Congress granted the states a limited right to divide "*disposable retired pay*." However, there is also no doubt that Congress specifically stated that the state's power to **treat** "*disposable retired pay*" as community property is **subject to the limitations of the Act**. Section (a)(4) of the Act removes any ambiguity as to the meaning of "*disposable*" by expressly defining what the state courts may divide. That section provides:

> "'**Disposable retired or retainer pay' means the total monthly retired or retainer pay** to which a member is entitled **less** amounts which--

> "(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts martial, federal employment taxes, and **amounts waived in order to receive compensation under Title 5 or Title 38**." (*Emphasis added*.)

Title 38 provides for compensation for a disability contracted in the line of duty. In the present case, Major Mansell was granted disability benefits under Title 38 and was required to waive a portion of his military longevity retirement in order to receive disability benefits (38 U.S.C. §3105). Since there is no ambiguity in §1408(a)(4)(B), the amount that Major Mansell receives as V.A. disability benefits must be subtracted from the total retirement benefits before the state can divide the remaining "*disposable retired pay*."

The Solicitor General contends (Amicus Curiae Brief [A.B.], 10-11) that §1408(e)(6) disclaims any preemptive effect of its own, and that it expressly contemplates obligations in excess of those enforceable through FUSFSPA. Section 1408(e)(6) provides:

> "Nothing in this section shall be construed to relieve a member of liability for payment of alimony, child support or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) [maximum of 50% of disposable retired pay] or subparagraph (B) of paragraph (4) [maximum of 65% of disposable retired pay for multiple court orders under

FUSFSPA and the Social Security Act]. Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid."

To begin with, it should be noted that the Social Security Act specifically **excludes community property claims** from the amount that may be attached under the Act (42 U.S.C. §662(c)). Further, subsection (e)(6) merely recognizes that the combined amount of child support, alimony, and other payments may exceed 50% of the disposable retired pay, as defined and limited by FUSFSPA, for a single order or 65% for multiple orders.

For instance, under FUSFSPA a family law judgment may award fifty percent of the disposable retired pay, as defined and limited by FUSFSPA, as child support and alimony. This would use up all of the garnishable funds under FUSFSPA. However, the judgment might also make a substantial community property award, the satisfaction of which would, when combined with the child support and alimony payments, exceed the maximum amount available for garnishment under FUSFSPA. If this were the case, §1408(e)(6) merely allows the former spouse to pursue other, **non-pre-empted enforcement remedies**. However, under §3101(a), attachment, levy and seizure are pre-

empted **"except to the extent specifically authorized by law."**

The Solicitor General implies that the language of §1408(e)(6) somehow provides a specific authorization for an exemption from §3101. This reading is too strained to warrant serious consideration in light of the unequivocal language of §3101(a). Major Mansell contends that the type of language required to provide the necessary **specific authorization** is found in §3101(a) itself.

Comparing the §3101 exemption, **specifically authorized by law**, to the language of §1408(e)(6) demonstrates the lack of merit in the Solicitor General's position.

Section 1408(e)(6) does nothing to expand the definition of "*disposable retired pay*." Section (e)(6) provides **no specific authorization**, as required by §3101, for attachment, levy or seizure for community property purposes. The section does not provide even a token of a purpose to extend immunity from pre-emption for community property division like the immunity for taxation of property purchased with the benefits.

The pertinent part of §1408(e)(6) provides:

"Nothing in this section shall be construed to relieve a member of liability for * * * other payments required by court order * * *. Any such unsatisfied obligation of a member may be enforced by any [other] means available under law * * *."

In contrast, the anti-attachment protection of §3101:

" * * * shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments."

Thus, nothing in 10 U.S.C. §1408(e)(6) provides immunity from the unequivocal anti-attachment provisions of 38 U.S.C. §3101.

> "If immunity is to be theirs, the statute conceding it must speak in clearer terms than the one before us here." (*Trotter v. Tennessee*, 290 U.S. 354, 357 (1933)).

Furthermore, Senate Report No. 97-330 on the Department of Defense Authorization Act of 1983 (P.L. 97-252), which enacted 10 U.S.C. §1408 (FUSFSPA), makes it clear that subdivision (e)(6) does not take anything from the anti-attachment statutes. Page 22 of Senate Report 97-502 (U.S. Code Congressional and Administrative News, 97th Congress, 2nd Session, 1982, Legislative

History, page 1617) to accompany S.1814, Uniformed Services Former Spouses Protection Act (Pub.L. 97-252) explains that paragraph (6) of subsection (e):

> ". . .is **intended to preserve** vehicles of enforcement--other than those available under section 1408 and the garnishment statute [42 U.S.C. §§659, 662]--where a member's liability for child support, alimony or other payments exceeds the maximum amounts the Secretary is authorized to pay **out of disposable retired or retainer pay** under section 1408." (*emphasis added*).

Thus, Congress informs us that subsection (e)(6) **preserves existing methods** of reaching disposable retirement pay. There is an immense gulf between **creation of new methods** of attaching V.A. disability benefits and mere **preservation of existing methods**. From their inception, the benefits have been exempt from attachment until they were converted to permanent investments. (*Trotter v. Tennessee*, 290 U.S. 354, 357 (1933)). Even FUSFSPA does nothing to reverse this traditional Congressional stand.

Major Mansell contends that the explicit definition of "*disposable retired pay*" simply supports, and is fully compatible with, the generalized Congressional design to exempt V.A. disability benefits from virtually all property actions, including the community property claims of Mrs. Forbes.

II
38 U.S.C. §3101 IS PART OF A GENERALIZED CONGRESSIONAL PLAN FOR PROTECTING VETERAN'S DISABILITY BENEFITS FROM ANY FORM OF ATTACHMENT EXCEPT FOR CHILD SUPPORT

Congress recognizes a special relationship between the nation and those who serve in its defense. For example, when Congress established the Department of Defense Military Retirement Fund (10 U.S.C. §§1461-1467), the Senate expressed the sense of the grateful nation when it said:

> " * * * Unlike other retirement programs, military retirement is an integral force management tool. Changes that undermine the integrity of this program can produce understandable and costly force structure consequences that can, in turn, weaken national defense capabilities. From another perspective, changes that undermine the program's integrity may constitute a breach of faith to those who have served and sacrificed in the defense of our nation. The Committee is sensitive to the confidence placed in Congress by our military personnel. Therefore, changes to the military retirement program must come as the product of thorough, thoughtful, and deliberate study that weighs heavily the impact of such changes on military force management and national security needs." (Senate Report No. 98-174, pp.221-222 to accompany S-675, Department of Defense Authorization Act of 1984, (Pub. L. 98-94), 97 Stat. 614 (10 U.S.C. §§1461-1467)).

Thus, Congress gives special attention to programs that could adversely impact the military retirement scheme. An intent to change the system should not be divined absent a clear expression of Congress.

To further the national policy concerning the military retirement system, Congress has charged the Veterans Administration with management of benefits for service-connected disabled veterans as its highest priority mission. (Senate Report No. 97-504 on the Omnibus Budget Reconciliation Act of 1982 (Pub.L.97-253), p.245). The Veterans' Benefits Act and FUSFSPA conform to this generalized Congressional plan to protect military retirement, and particularly veterans' disability benefits.

> "The basic purpose of the disability compensation program, throughout its history, has been one of providing relief from the impaired earning capacity of veterans disabled as the result of their military service. The amount of compensation payable varies according to the degree of disability which, in turn, is required by law to represent, to the extent practical, the average impairment in earning capacity resulting from such disability or combination of disabilities in civil occupations." (House Report No. 96-1155, p. 4, Veterans' Disability Compensation and Housing Benefits Amendments of 1980 (Public L. 96-385)).

In addition to providing at least some compensation for the injuries and disabilities that have been visited upon members in the service of their country, disability payments also benefit the nation as a whole. Congress may

well have determined that disability payments help maintain a fit military force by encouraging those eligible for benefits to retire, rather than to conceal their disability and continue in active service for economic reasons. Protection of those disability benefits also helps preclude service members from concealing their impairments until they are transferred to a state that will not try to diminish the compensation by awarding part of it to a healthy former spouse. Like most of the other fringe benefits, they also facilitate recruitment. Furthermore, adequate disability benefits help avoid the possibility that disabled veterans will be a burden on local communities and other state and federal programs.

The thorough, thoughtful, and deliberate balance weighed by Congress (Senate Report No. 98-174) concerning payment of V.A. disability benefits is evinced by their singular treatment of retired military members, as opposed to other federal retirees. Unlike retired military members, other federal retirees who qualify for V.A. compensation are not required to waive a portion of their retirement pay to receive V.A. benefits. Civil Service employees in the executive, legislative and judicial branches of government, certain foreign service retirees of the Department of State, and certain Central Intelligence Agency retirees can receive both full retirement pay and full V.A. compensation (*Absher v. U.S.*, 9 Ct.Cl. 223, 224 (1985), aff'd, 805 F.2d 1025 (Fed.Cir., 1986), cert. den., ___U.S.___, 107 S.Ct. 1953 (1987)). Military retirees may not (38 U.S.C. §3105). A program as carefully balanced as the V.A. dis-

ability compensation system should not be disrupted by the vagaries of the laws of the fifty states.

Further evidence of the overall Congressional intent to protect V.A. disability benefits can be found in other federal programs. For instance, the Social Security Act waives federal immunity from attachment of federal pay, including military pay, for child support and alimony (42 U.S.C. §659). However, community property is specifically excluded from the definition of alimony (42 U.S.C. §662(c)).

Congress allows garnishment of Civil Service retirement benefits for community property purposes (Pub.L. 95-366, 92 Stat. 600, 5 U.S.C. §8345(j)). And, Congress allows garnishment of Foreign Service retirement for community property division (22 U.S.C. §§4044, *et seq.*). However, Congress, presumably for good and sufficient reasons, has enacted no comparable provision for benefits payable by the Veterans Administration.

This contention finds added support in the provision of a separate benefit for a disabled veteran's dependent spouse (38 U.S.C. §315), a benefit which terminates on the last day of the calendar month in which an annulment or divorce occurs (38 U.S.C. §3012(b)(2)). Until Congress chooses to act, its long-standing anti-attachment policy, as expressed in the Veterans' Benefits Act, FUSFSPA and the Social Security Act is controlling.

The entire history of the anti-attachment provision demonstrates Congressional insistence on maintaining the protected status of veteran's disability benefits. From the

earliest days of the benefit program, Congress has responded to every attempt to limit the protection of the anti-attachment clause.

In 1873, Congress declared the national policy to exempt veterans' benefits from creditors' claims as well as from taxation (Act of March 3, 1873, R.S. Title 57 §4747 (March 3, 1873) ([former] 38 U.S.C.A. §54)). The original Section 4747 provided:

> "No sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the Pension-Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

In 1924, Congress passed the World War Veterans' Act, c. 320, 43 Stat. at L. 607, 613 (38 U.S.C. §454). Section 22 of the Act provided:

> "That the compensation, insurance, and maintenance and support allowance payable under Titles II., III., and IV. respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Titles II., III., or IV.; and shall be exempt from all taxation: provided, that such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Titles II., III., IV., and V. against the person on whose account the compensation, insurance, or maintenance and support allowance is payable. * * * *"

In *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933), the Court held that monies payable under the World War Veteran's Act were unquestionably exempt until they came into the hands of the veteran. In *Trotter, supra*, the issue was whether land purchased with disability compensation was subject to taxation. At the time, the World War Veterans' Act protected the disability payments from taxation.[2] However, the Court held that the exemption did not apply after the monies were converted into land and buildings (*Ibid.*). In so holding, the Court said:

> "We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises. Veterans who choose to trade in land or in merchandise, in bonds or in shares of stock, must pay their tribute to the state. If immunity is to be theirs, the statute conceding it must speak in clearer terms than the one before us here." (*Trotter*, 290 U.S. at 357).

The Court left open the question of whether the exemption remained in force after the money was deposited in a veteran's bank account. However, Congress responded by closing the question.

Immediately following the *Trotter* decision, Congress amended the anti-attachment provision. The Act of August 12, 1935, Pub.L. 262, 74th Congress, c. 510, 49 Stat.

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2. The clause at issue provided: "The compensation, insurance and maintenance and support allowance * * * shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made * * * and shall be exempt from all taxation."

at L. 607, 609, ([former] 38 U.S.C. §454a), provided, under §3 of the Act:

> "Payment of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, **either before or after receipt by the beneficiary.** Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to property purchased in part or wholly out of such payments. Section 4747 of the Revised Statutes and Section 22 of the World War Veterans' Act, 1924, are hereby repealed, and all other acts inconsistent herewith are hereby modified accordingly * * * " (emphasis added).

This was the first appearance of the language used in the current 38 U.S.C. §3101. It was drafted immediately after the Court failed to discover, in *Trotter v. Tennessee*, 290 U.S. 354 (1933), the Congressional intent to protect the funds after the money was in the hands of the disabled veterans.

Within a few short years after the Act of 1935 ([former] 38 U.S.C. §454a), the scope of the anti-attachment provision was again before the Court. In *Lawrence v. Shaw*, 300 U.S. 245 (1937), the Court discussed the details of the anti-attachment provision added in the 1935 Act. One of the changes was the provision that

the benefits are exempt, even after receipt by the beneficiary. However, a qualification was added to remove protection from "any property purchased in part or wholly out of such payments." (300 U.S. at 249). As the Court pointed out, the disability benefits are intended primarily for the support and maintenance of the veteran (300 U.S. at 250). It is inconceivable that Congress could have intended that the benefits lose immunity simply because they are deposited in a bank (300 U.S. 249-250). Therefore, so long as the benefits are not converted into investments, they maintain their immunity until they are expended (300 U.S. at 250-251).

The *Lawrence* decision dealt only with the claim of exemptions from taxation. However, two years after *Lawrence*, in *Carrier v. Bryant*, 306 U.S. 545 (1939), the Court held that creditors could reach the benefits after they were invested in property (306 U.S. at 550). There was no Congressional response to either the *Lawrence v. Shaw* case or the decision in *Carrier v. Bryant*. Nor was there any Congressional response when the Court held that offsets by attachment of other assets constitute a forbidden seizures (*Wissner v. Wissner*, 338 U.S. 655, 659 (1950)).

In 1958, Congress adopted the Veterans' Benefits Act, September 2, 1958, Pub.L. 85-857; 72 Stat. 1105, in which the laws relating to veterans' benefits were revised, codified and enacted as Title 38, U.S.C., "Veterans' Benefits." No significant changes were made to the anti-attachment provisions.

In *Porter v. Aetna Casualty and Surety Company*, 370 U.S. 159 (1962), a judgment creditor attempted to attach accounts which had been established with disability compensation for the benefit of the disabled veteran. The Court pointed out that Congress intended that veterans, in the safekeeping of their benefits, should be able to utilize those normal modes adopted by the community for that purpose--provided the benefit funds, regardless of the technicalities of title and other formalities, are readily available as needed for support and maintenance, actually retained the qualities of monies, and have not been converted into permanent investments (370 U.S. at 162).

Congress has carefully followed the Court's analysis of the anti-attachment clause of the Veteran's Benefits Act. Each time the Court has expressed doubt about the scope of the protection, Congress has clarified the safeguard. Therefore, if Congress intended the demise of the anti-attachment provision of the current 38 U.S.C. §3101 upon receipt of the benefits by the disabled veteran, it would have amended the Act following *Lawrence v. Shaw*, 300 U.S. (1937), which expressly recognized that the benefits are safeguarded so long as they maintain the quality of money. If Congress wanted to allow attachment or seizure of the benefits by assignment of other assets in the form of an offset, it would have amended the Act following the Court's decision in *Wissner v. Wissner*, 338 U.S. 655 (1950). Congress certainly knows how to allow attachment. It did nothing to change the shelter after the Court allowed creditors to reach permanent investments pur-

chased with the benefits (*Carrier v. Bryant*, 306 U.S. 545 (1939)).

The significance of 38 U.S.C. §3101 in the present case, is that it does speak in clear terms concerning exemptions to the protection of the funds after receipt by the beneficiary. Section 3101 specifically states that the exemption from taxation does not extend to any property purchased in part or wholly out of the disability payments. However, there is no such exemption from the anti-attachment provisions for the community property claims of former spouses.

Furthermore, subdivision b of §3101 specifically **prohibits collection, by offset or otherwise**, out of the benefits except for amounts due to the federal government by reason of overpayments or illegal payments. Nevertheless, Mrs. Forbes, without citing any specific statutory language, claims a position even stronger than that of the federal government.

Congress is sensitive to the confidence placed in it by military personnel. Therefore, changes to the military retirement program must come as the product of thorough, thoughtful, and deliberate study that weighs heavily the impact of such changes on military force management and national security needs. When Congress intends to allow exemption from the anti-attachment policy, it specifically says so. Congress allows attachment of permanent investments for tax obligations. Congress also allows offset to recover overpayments and unlawful payments. However, nothing in any statute or decision of the Court allows at-

tachment or offset for collection of Mrs. Forbes' community property claims.

III
OFFSETTING GARNISHMENT OF OTHER ASSETS CONSTITUTES A SEIZURE OF THE V.A. DISABILITY BENEFITS FORBIDDEN BY 38 U.S.C. §3101

California may not make an offsetting award from other assets (*Wissner v. Wissner*, 338 U.S. 655, 659 (1951)). To do so would, in effect, anticipate the benefit in violation of the statute, just as would awarding a house or other property as an offset (*Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588-589 (1979)), and as imposition of a constructive trust would operate as a forbidden "seizure." (*Ridgway v. Ridgway*, 454 U.S. 46, 60 (1981)). The state court's attempt to limit the anti-attachment provisions because of equitable interests violates the unqualified sweep of the statute. Section 3101 prohibits, in the broadest of terms, any "*attachment, levy, or seizure by or under any legal or equitable process whatever*," even after receipt by the disabled veteran (*Ridgway*, 454 U.S. at 60).

In *McCune v. Essig*, 199 U.S. 382 (1905), it was claimed that state homestead law created a beneficial interest in property that was originally under the control of the United States. The claimant argued that as soon as titled passed out of the government it "instantly dropped back in time to the inception or initiation of the equitable right," and that the laws of the state intercepted and

prevented the federally designated beneficiary from obtaining complete title without first complying with state law. However, the Court held that the argument was just another way of imposing state limitations upon federally created rights. The Court held that, **since federal law placed the property in the hands of another, state law could not interfere** (*McCune*, 199 U.S. at 390).

In *Free v. Bland*, 369 U.S. 663 (1962), a widower claimed exclusive ownership in certain United States savings bonds by virtue of the treasury regulations. The deceased's son by a prior marriage claimed an interest in the bonds under his mother's will by virtue of the state community property laws (*Id.*, at 664). The state court awarded title to the bonds to the husband, but ordered reimbursement to the step-son by virtue of the community property laws. In essence, this is precisely what Mrs. Forbes is trying to do in the present case.

The Court's analysis started with the often-quoted phrase:

> "The relative importance to the state of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, clause 2." (*Free, supra*, 369 U.S. at 666).

After determining that the federal law was valid, the Court determined that conflicting state law must yield (369 U.S. at 668).

The Court then addressed the state's order that the husband be required to account for one-half the value of

the bonds to the decedent's estate. The Court said, "*Viewed realistically, the state has rendered the award of title meaningless.*" (*Id.*, 369 U.S. at 669). Therefore, **the offset could not stand.**

In *Wissner v. Wissner*, 338 U.S. 655 (1950), the Court found it unnecessary to decide whether California is entitled to call Army pay community property (*Id.*, 338 U.S. at 657 n.2). Nevertheless, for two separate reasons, the Court held that the wife of a deceased Army officer had no community property interest in the proceeds of a National Service Life Insurance policy, the premiums of which were paid with community property.

The Court held that because the federal statute gave the service member the absolute right to designate the beneficiary, **the state may not interfere** with that designation by awarding the proceeds to another, or **by awarding an equivalent amount under some other theory** (336 U.S. at 659).

As an independent ground for reversing the California community property award of the benefits, the Court held that **the state judgment was in effect a seizure in violation of [former] 38 U.S.C. §816** (*Ibid.*). It is significant to note that the operative language of §816 is identical, word-for-word, to the operative language of §3101.

The *Wissner* court commented on the distinction between community property obligations and support obligations based upon particular needs in alimony and support cases. These comments eventually formed the basis of the

holding of the Court in the recent case of *Rose v. Rose*, 481 U.S. ___, 107 S.Ct. 2029 (1987).

Concerning an offsetting award of other assets, the *Wissner* Court held:

> "Whether directed at the very money received from the government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." (338 U.S. at 659).

Congress left the anti-attachment provision unchanged following the *Wissner* decision.

Almost thirty years later, the Court again addressed an offsetting award of other property to compensate for federal pre-emption of state community property laws. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the Court held that **an offsetting award would defeat the purpose of the statute barring anticipation of payments** (*Id.*, at 588-590). One of the reasons for disallowing offsets is that Congress might alter the benefits. If past California property settlements had been based on the benefits, then the change in the benefits would have worked a multiple penalty on future recipients. Barring lump sum community property settlements based on mere expectations, the prohibition against anticipation prevents such an obvious frustration of congressional purpose. It also preserves congressional freedom to amend the Act, and so serves much the same function as the frequently stated understanding that programs of this nature convey no future rights and so may be changed without taking property in violation of the

Fifth Amendment (see *Richardson v. Belcher*, 404 U.S. 78, 80-81 (1971)).

Like anti-attachment provisions generally, §3101 ensures that the benefits are actually received by the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process, notwithstanding any other law of any state. It prevents the vagaries of state law from disrupting the national scheme and guarantees a national uniformity that enhances the effectiveness of Congressional policy.

IV
V.A. DISABILITY BENEFITS MAY NOT BE DIVIDED AS COMMUNITY PROPERTY BECAUSE THEY ARE NOT A FORM OF PROPERTY

FUSFSPA allows the states to "*treat*" (characterize) some portions of military longevity retirement pay as property. Nevertheless, and in spite of Mrs. Forbes' claims, FUSFSPA does not change the character of these federal benefits. Military retirement pay is reduced compensation for reduced service (*U.S. v. Tyler*, 105 U.S. 244 (1882)). Virtually every federal court that has examined the issue, has held that military retired pay is other than a property right (see e.g., *Costello v. U.S.*, 587 Fed.2d 424 (9th Cir., 1978) cert. den. 442 U.S. 929 (1979)). Since it is not property, it cannot be property of the community.

The California Supreme Court in *In re Marriage of Fithian*, 10 Cal.3d 592 (1974), held, contrary to all federal decisions on the question, that military retired pay was

deferred compensation for past services and **not** reduced compensation for reduced current services. The California court in the present case followed this interpretation of military retirement. Nevertheless, military retirement pay is made due and payable to the military member on a monthly basis to compensate him for obligations he meets, on a monthly basis, to the armed forces (*Costello v. U.S.*, 587 F.2d 424, 427 (9th Cir,. 1978), cert. den. 442 U.S. 929 (1979); *Abbott v. U.S.*, 200 Ct.Cl. 384, cert. den., 414 U.S. 1024 (1973)). The military member never acquires either a contract or a vested right to receive retired pay (*Costello*, 587 F.2d 424).

A military retiree's pay is always subject to forfeiture or modification; it never "vests" or "matures" into an absolute right. "Most importantly, retirement pay does not become vested in the retired individual except on a daily basis." (*Watson v. Watson*, 424 F.Supp. 866, 869 (E.D.N.C., 1976)).

The Court, and virtually every other federal court that has ever examined the issue, has held that military retired pay is current compensation, as opposed to a deferred pay for prior service.[3] The courts have pointed out numerous

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3. See e.g., *U.S. v. Tyler*, 105 U.S. 244 (1882); *Franklin v. U.S.*, 29 Ct.Cl. 6 (1893); *U.S. v. Morton*, 112 U.S. 1 (1884); *U.S. v. Mills*, 197 U.S. 223 (1904); *Kahn v. Anderson*, 255 U.S. 1 (1921); *Leonard v. U.S.*, 279 U.S. 40 (1928); *Marvin v. U.S.*, 78 Ct.Cl. 567 (1933); *Lockhard v. Mittlemann*, 123 F.2d 703 (2d.Cir., 1941); *Hoeppel v. Westover*, 79 F.Supp. 794 (S.D.Cal., 1948); *Lemley v. U.S.*, 75 F.Supp. 248 (Ct.Cl., 1948); *Hooper v. Hartman*, 163 F.Supp. 427 (S.D.Cal., 1958), aff'd. 274 F.2d 429 (9th Cir., 1959); *Jones v. U.S.*, 185 F.Supp. 437 (E.D.N.Y., 1960); *Hostinsky v. U.S.*, 292 F.2d 508 (Ct.Cl., 1961); *Chambers v. Russell*, 192 F.Supp. 425 (N.D.Cal., 1961); *Andrews v. U.S.*, 1975 Ct.Cl. 561 (1966); *Abbott v. U.S.*, 200 Ct.Cl. 384 (1973) cert. den., 414 U.S. 1024 (1973);

reasons why military retired pay is current compensation for reduced services. A few of those reasons are that retired officers are subject to reductions in pay if they receive certain other employment (5 U.S.C. §5532); complete forfeiture of pay is required for certain crimes (5 U.S.C. §8312); employment with defense work for private firms is forbidden within three years of retirement (37 U.S.C. §801); employment by any foreign government is prohibited (U.S. Const., Art. I, Sec. 9, Cl. 8); a retired regular officer remains a member of the regular service (10 U.S.C. §§3504(a), 8504(a)); a retired reserve officer is subject to recall, without consent, at any time (10 U.S.C. §672); a retired regular officer may not represent one who sells property to the government branch in which he holds retired status (Pub.L. 87-849, §2, 76 Stat. 1126); pay is forfeited if foreign citizenship is acquired (an act inconsistent with service to the military of the United States) (37 Comp.Gen. 207 [Navy]); the military member is subject to the Uniform Code of Military Justice (10 U.S.C. §§802, 804); a retired officer may be dropped from the roll for civil conviction and sentence exceeding three months ([former] 34 U.S.C. §1200); and, indeed, a retired service member may be recalled to active duty and dismissed--a Commissioned Officer's equivalent to an Enlisted

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Watson v. Watson, 424 F.Supp. 866 (E.D.N.C., 1976); *Puglisi v. U.S.* 564 F.2d 402 (1977), cert. den., 435 U.S. 968 (1978); *Costello v. U.S.* 587 F.2d 424 (9th Cir., 1978) cert. den. 442 U.S. 929 (1979); etc.

member's Dishonorable Discharge (*Hooper v. U.S.*, 326 F.2d 982 (Ct.Cl., 1964), cert. den. 377 U.S. 977 (1964)).

The military member can eliminate the risk of recall by resigning from the military and having their name stricken from the roll of retired officers. That act would end their vulnerability to recall, but it would also terminate their entitlement to retired pay (see *Allen v. U.S.*, 91 F.Supp. 933 (Ct.Cl., 1950); *Hooper v. Hartman*, 163 F.Supp. 437 (S.D.Cal., 1958), aff'd 274 F.2d 429 [9th Cir., 1959]).

> "It is impossible to hold that men who are by statute declared to be part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specific duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still **not** in the military." (*Original emphasis*) (*Tyler*, 105 U.S. at 246).

Unlike private pension plans, the member does not contribute regular amounts to the retirement fund prior to retirement. A non-military employee acquires a "vested right" in his retirement plan because he has contributed to the pool or fund of money prior to the retirement which may be viewed as "property" and in which such vested rights attach. Upon retirement, the non-military retiree draws a specified amount from the fund on a regular basis as established by the retirement contract. In contrast, *Cos-*

tello v. U.S., 587 F.2d 424 (9th Cir., 1978), cert. den., 442 U.S. 929 (1979), teaches that, even after retirement, the retiree has "no vested right" in any particular level of compensation--it is not deferred compensation since the level can be reduced prospectively (*Id.* at 426).

In *Costello*, the court rejected the argument that Congress' alteration of the method by which retired pay is calculated deprived military retirees of property without due process of law. The court noted that retired pay has also been reduced, by formula, in the Dual Compensation Act, 5 U.S.C. §5532. That reduction has withstood due process challenges precisely on the rationale that retired pay is not property (*Puglisi v. U.S.*, 564 F.2d 403 (Ct.Cl., 1977), cert. den., 435 U.S. 968 (1978)).

The inescapable conclusion which flows from the fact that retirement pay is not property is that, without Congressional sanction, a state judgment is not entitled to respect insofar as it divides military retired pay as property prior to the time when those federally created rights come into existence. When Congress does give the states a limited power to divide the retirement pay, the states cannot divide more than the express limits allowed by Congress.

V
CALIFORNIA'S INTERPRETATION OF FUSFSPA, WHICH ALLOWS PROPERTY DIVISION OF V.A. DISABILITY BENEFITS, WORKS AN UNCONSTITUTIONAL TAKING

California's division of more than the "*disposable retired pay*" portion of military retirement benefits as vested property forces an unconstitutional application of FUSFSPA. Redirecting retirement benefits, as *vested property* due for services already performed, from the retired member to whom it belonged in its entirety under federal law (*McCarty v. McCarty*, 453 U.S. 210 (1981)), would represent an impermissible taking of a settled interest (*U.S. v. Larionoff*, 431 U.S. 864, 879 (1977)). It would be no less of a "taking" than if Congress had directed that the reduced amount be retained in the Treasury.

On at least two prior occasions the Court specifically found it unnecessary to decide whether the states may characterize military retirement benefits as community property.[4] Congress, with the passage of FUSFSPA, has now made that decision, at least to the extent Congress allows community property division of "*disposable retired pay*," as it is defined and limited in FUSFSPA (10 U.S.C.

4.

"The view we take of this case makes it unnecessary to decide whether California is entitled to call army pay community property." (*Wissner v. Wissner*, 338 U.S. 655, 657, n.2 (1951)). " * * * we need not decide today whether federal law prohibits a State from characterizing retired pay as deferred compensation * * * " (*McCarty v. McCarty*, 453 U.S. 210, 222-223 (1981)).

§1408(c)(1) and (a)(4)). However, California has gone far beyond FUSFSPA and held that Major Mansell's V.A. disability benefits, which are **excluded** from the definition of *disposable retired pay* (§1408(a) (4)(B)), are property subject to division as community property (Opinion, J.S., App. D 8-11). Even if the Court agrees that taking half of Major Mansell's V.A. disability benefits and giving the money to Mrs. Forbes as community property promotes a valuable social plan, and even if the Court is in complete sympathy with the purpose and intended results, if the provisions of the statute, as applied by California, go beyond the boundaries of constitutional power, the Court must declare it unconstitutional (*Railroad Retirement Board v. Alton Railroad Company*, 295 U.S. 330, 346 (1935)). Therefore, if the Court rejects Major Mansell's federal pre-emption argument (Sections I, II and III above), then the characterization issue is squarely before the Court.

In the instant case, the California court held that military retirement benefits are actually vested property (Opinion, J.S., App. D-10). Since Congress has allowed retroactive taking of the benefits without compensation, FUSFSPA is invalid under California's application of the statute. If FUSFSPA actually alters vested property rights, the Act denies due process of law by taking the property of one and bestowing it upon another (*Railroad Retirement Board v. Alton Railway Co.*, 295 U.S. 330, 350 (1935)). However, this constitutional problem with FUSFSPA does not arise if the retirement benefits are current compensation for current reduced services because Congress may

prospectively reduce the pay of servicemen (*U.S. v. Larionoff*, 431 U.S. 864, 880 (1977)).

On the other hand, if California is correct and military retirement benefits are actually vested property, then when Congress modified the direct obligation which the United States owes Major Mansell, the due process standard to which the modifying legislation may be held is higher than if the legislation merely regulated relations between private parties (*Lynch v. U.S.*, 292 U.S. 571, 579 (1934)).

> "There is a clear distinction between the power of Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements * * * " (*Perry v. U.S.*, 294 U.S. 330, 350-351 (1935)).

If the Court in the present case determines that military retirement is property, and if the Court determines that FUSFSPA allows California to divide Major Mansell's Veterans Administration disability benefits as property, then FUSFSPA is unconstitutional because it would amount to depriving a service member of pay due for services already performed, but still owing (*U.S. v. Larionoff*, 431 U.S. 864, 879 (1977)).

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as would be if the repudiator had been a State or a municipality

or a citizen." (*Sinking Fund Cases*, 99 U.S. 700, 719 (1879)).

Further, the Court has repeatedly emphasized that constitutional requirements of due process apply to garnishment procedures whenever the government acts jointly with a creditor, such as Mrs. Forbes, in securing disputed property (see e.g., *Lugar v. Edmondson Oil*, 457 U.S. 922 (1982); *Northern Georgia Finishing v. Di-Chem* 419 U.S. 601 (1975); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969)).

In *U.S. v. Larionoff*, 431 U.S. 864 (1977), military members extended their enlistments in return for a promise that a bonus award would be paid to them. Prior to the expiration of the re-enlistment term, military regulations altered the nature of the bonus program, and certain members who had re-enlisted were omitted in the regulations as eligible to receive the bonus. The military members argued that Congress had not intended to divest them of rights they had already earned, so that the military regulations which so provided were invalid. In holding for the servicemen, the Court noted:

> "Of course, if Congress had such an intent, serious constitutional questions would be presented. No one disputes that Congress may prospectively reduce the pay of members of the armed forces, even if that reduction deprives members of benefits they had expected to be able to earn. (Cf., *Bell v. United States*, 366 U.S. 393, 554 (1940)). It is quite a different matter, however, for Congress to deprive a service member of any pay due for services already performed, but still owing. In that case, the Congressional action would appear in a different constitutional light." (*Larionoff*, 431 U.S. at 879).

In commenting on this language, the Court, in *Costello v. U.S.*, 587 F.2d 424 (9th Cir., 1978), cert. den. 442 U.S. 929 (1979), determined that it would "proceed on the assumption, arguendo, that if military retirement pay had been fully earned at the date of retirement, it could not be divested without compensation." (*Costello*, 587 F.2d at 427 n. 2). When private pension rights are vested, they may not be altered without the consent of the pensioner (*Allied Chemical and Alkali Workers v. PPG Company*, 404 U.S. 157, 181 n. 20 (1971)). "There is no warrant for taking the property or money of one and transferring it to another without compensation * * * " (*Railroad Retirement Board v. Alton Railway Co.*, 295 U.S. 330, 357 (1935)). If a Congressional enactment alters vested rights,

> "[t]he act denies due process of law by taking the property of one and bestowing it upon another." (Id., at 350).

Major Mansell recognizes the Congressional authority to regulate the compensation of military members. If Congress exercised that authority prospectively when it enacted FUSFSPA, and if Congress provided for division of current earnings in the form o retirement pay, the Act may pass constitutional muster because Congress may prospectively reduce the pay of servicemen (*U.S. v. Larionoff*, 431 U.S. 864, 879 (1977)). However, if Califor-

nia is correct and military retirement pay is deferred compensation for past service (*In re Marriage of Fithian*, 10 Cal.3d 592 (1974); *Casas v. Thompson*, 42 Cal.3d 131 (1986)), then FUSFSPA is unconstitutional. Redirecting retirement benefits, as vested property due for services already performed, from the retired member to whom it belonged in its entirety under federal law (*McCarty v. McCarty*, 453 U.S. 210 (1981)), represents an impermissible taking of a settled interest (*U.S. v. Larionoff*, 431 U.S. 864, 879 (1977)). It would be no less of a "taking" than if Congress had directed that the reduced amount be retained in the Treasury.

CONCLUSION

The Opinion of the Court of Appeal of the State of California, insofar as it denied Major Mansell's motion to modify the Judgment of Dissolution of Marriage to delete paragraph 6 (J.S.App.A), should be reversed.

Respectfully Submitted,

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APPENDIX
Texts of Constitutional and Statutory Provisions

U.S. Constitution, Article I, Section 9, Clause 8

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

U.S. Constitution, Article VI, Clause 2

Supreme Law of Land

The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

TITLE 5 U.S.C.

§5532. Employment of retired members of the uniform services; reduction in retired or retainer pay

(b) A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retainer pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retainer pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retainer pay under this subsection, the amount of $2,000 shall be increased, from time to time, by appropriate percentage, in direct proportion to each increase in retired or retainer pay under section 1401a(b) of title 10 to reflect changes in the Consumer Price Index.

TITLE 5 U.S.C.

§8312. Conviction of certain offenses

(a) An individual, or his survivor or beneficiary, may not be paid annuity or retired pay on the basis of the service of the individual which is creditable toward the annuity or retired pay, subject to the exceptions in section 8311(2) and (3) of this title, if the individual--

(1) was convicted, before, on, or after September 1, 1954, of an offense named by subsection (b) of this section, to the extent provided by that subsection; or

(2) was convicted, before, on, or after September 26, 1961, of an offense named by subsection (c) of this section, to the extent provided by that subsection.

The prohibition on payment of annuity or retired pay applies--

(A) with respect to the offenses named by subsection (b) of this section, to the period after the date of conviction or after September 1, 1954, whichever is later; and

(B) with respect to the offenses named by subsection (c) of this section, to the period after the date of conviction or after September 26, 1961, whichever is later.

TITLE 5 U.S.C.

§8345. Payment of benefits; commencement, termination, and waiver of annuity

(j)(1) Payments made under this subchapter which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person.

TITLE 10 U.S.C.

§672. Reserve components generally.

(a) In time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the

Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of any reserve component under the jurisdiction of that Secretary to active duty (other than for training) for the duration of the war or emergency and for six months thereafter. However, a member on an inactive status list or in a retired status may not be ordered to active duty under this subsection unless the Secretary concerned, with the approval of the Secretary of Defense in the case of the Secretary of a military department, determines that there are not enough qualified Reserves in an active status or in the inactive National Guard in the required category who are readily available.

TITLE 10 U.S.C.

§802. Art. 2. Persons subject to this chapter.

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

TITLE 10 U.S.C.

§804. Art. 4. Dismissed officer's right to trial by court-martial

(a) If any commissioned officer, dismissed by order of the President, makes a written application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try that officer on the charges on which he was dismissed. A court martial so convened has jurisdiction to try the dismissed officer on those charges, and he shall be considered to have waived the right to plead any statute of limitations applicable to any offense with which he is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court-martial acquits the accused or if the sentence adjudged, as finally approved or affirmed, does not include dismissal or death, the Secretary concerned shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issue.

TITLE 10 U.S.C.

§1408. Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) "Court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved

property settlement incident to such previously issued decree), which--

(A) is issued in accordance with the laws of the jurisdiction the court;

(B) provides for--

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals, under the laws applicable to such appeals or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which--

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts

withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's named was placed on the temporary disability retired list); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt is requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identifying the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the

Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned or transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d)(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order. In the case of a member entitled to receive

retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired or retainer pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively

served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court order) minus--

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired or retainer pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired or retainer pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any dis

closure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known residence.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

TITLE 10 U.S.C.

§3504. Retired members: limitations; grade

(a) The President may order any retired member of the Regular Army to active duty. He may assign a member ordered under this subsection to such duties as he considers necessary in the interests of national defense.

[Repealed. Pub.L. 96-513, Title II, §210, Dec. 12, 1980, 94 Stat. 2884]

TITLE 10 U.S.C.

§8504. Retired members: limitations; grade

(a) The President may order any retired member of the Regular Air Force to active duty. He may assign a member ordered under this subsection to such duties as he considers necessary in the interest of national defense.

[Repealed. Pub.L. 96-513, Title II, §210, Dec. 12, 1980, 94 Stat. 2884]

TITLE 22 U.S.C.

§4044. Definitions

As used in this part, unless otherwise specified, the term--

(4) "court order" means any court decree of divorce or annulment, or any court order or court approved property settlement agreement incident to any court decree of divorce or annulment;

TITLE 28 U.S.C.

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. For the purpose of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

TITLE 37 U.S.C.

§801. Restriction on payment to certain officers

(b) Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to any officer on a retired list of the Regular Army, the Regular Navy, the Regular Air Force, the Regular Marine Corps, the Regular Coast Guard, the National Oceanic and Atmospheric Administration, or the Public Health Service, who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the National Oceanic and Atmospheric Administration, or the Public Health Service.

TITLE 38 U.S.C.

§310. Basic Entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

TITLE 38 U.S.C.

§314. Rates of wartime disability compensation

For purpose of section 310 of this title--

(a) if and while the disability is rated 10 percent the monthly compensation shall be $71;

(b) if and while the disability is rated 20 percent the monthly compensation shall be $133;

(c) if and while the disability is rated 30 percent the monthly compensation shall be $202;

(d) if and while the disability is rated 40 percent the monthly compensation shall be $289;

(e) if and while the disability is rated 50 percent the monthly compensation shall be $410;

(f) if and while the disability is rated 60 percent the monthly compensation shall be $516;

(g) if and while the disability is rated 70 percent the monthly compensation shall be $652;

(h) if and while the disability is rate 80 percent the monthly compensation shall be $754;

(i) if and while the disability is rated 90 percent the monthly compensation shall be $849;

(j) if and while the disability is rated as total the month compensation shall be $1,411;

TITLE 38 U.S.C.

§315. Additional compensation for dependents

Any veteran entitled to compensation at the rates provided in section 314 of this title, and whose disability is rated not less than 30 percent shall be entitled to additional compensation for dependents in the following monthly amounts:

(1) If and while rated totally disabled and--

(A) has a spouse but not child, $82;

(B) has a spouse and one or more children, $138 plus $44 for each child in excess of one;

(C) has no spouse but one or more children, $57 plus $44 for each child in excess of one;

(D) has a parent dependent upon veteran for support, then, in addition to the above amounts, $67 for each parent so dependent;

(E) notwithstanding the other provisions of this paragraph, the monthly payable amount on account of a spouse who is (i) a patient in a nursing home or (ii) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person, shall be $149 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section; and

(F) notwithstanding the other provisions of this paragraph, the monthly amount payable on account of each child who has attained the age of eighteen years and who is pursuing a course of instruction at an approved educational institution shall be $126 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section.

(2) If and while rated partially disabled, but not less than 30 percent in an amount having the same ratio to the amount specified in paragraph (1) of this section as the degree of disability bears to total disability, the amounts payable under this paragraph, if not a multiple of $1, shall be rounded down to the nearest dollar.

TITLE 38 U.S.C.

§355. Authority for schedule for rating disabilities

The Administrator shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. The schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10 percent, 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, 80 percent, 90 percent, and total, 100 percent. The Administrator shall from time to time readjust this schedule of ratings in accordance with experience.

TITLE 38 U.S.C.

§3012. Effective dates of reductions and discontinuances

(b) The effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension--

(2) by reason of marriage annulment, divorce, or death of a dependent of a payee shall be the last day of the month in which such marriage, annulment, divorce, or death occurs;

TITLE 38 U.S.C.

§3101. Nonassignability and exempt status of benefits

(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this

title, or of servicemen's indemnity. For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving his or benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or his estate; or (2) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws to such beneficiary or his estate to his dependents as such. If the benefits referred to in the preceding sentence are insurance payable by reason of yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance issued by the United States, the exemption provided in this section shall not apply to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness is in the form of liens to secure unpaid premiums or liens, or interest on such premiums or liens or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits.

(c) In the case of a person who--

(1) has been determined to be eligible to receive pension or compensation under laws administered by the Veterans' Administration but for the receipt by such person of pay pursuant to any provision of law providing retired or retirement pay to members or former members of the Armed Forces or commissioned officers of the National Oceanic and Atmospheric Administration of of the Public Health Service; and

(2) files a waiver of such pay in accordance with section 3105 of this title in the amount of such pension or compensation before the end of the one-year period beginning on the date

such person is notified by the Veterans' Administration of such person's eligibility for such pension or compensation,

the retired or retirement pay of such person shall be exempt from taxation, as provided in subsection (a) of this section, in an amount equal to the amount of pension or compensation which would have been paid to such person but for the receipt by such person of such pay.

TITLE 38 U.S.C.

§3105. Waiver of retired pay

Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Veterans' Administration of the receipt of any such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay.

TITLE 42 U.S.C.

§659. Enforcement of individual's legal obligations to provide child support or make alimony payments

(a) United States and District of Columbia to be subject to legal process.

Notwithstanding any other provision of law (including section 407 of this title) effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private

person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

TITLE 42 U.S.C.

§662. Definitions

For purposes of section 659 of this title--[enforcement of individual's legal obligations to provide child support or make alimony payments]

(c) The term "alimony," when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

GERALD E. MANSELL,	)	
	)	
Appellee,	)	NO. 87-201
	)	
vs.	)	
	)	
GAYE M. FORBES,	)	
	)	
Appellee.	)	
	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the APPELLANT'S BRIEF ON THE MERITS by mail on August 19, 1988, as follows:

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JIM T. ELIA
Counsel for Appellant

MOTION

MOTION FILED
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No. 87-201

In the Supreme Court of the United States

OCTOBER TERM, 1988

GERALD E. MANSELL, APPELLANT

v.

GAYE M. (MANSELL) FORBES

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIFTH APPELLATE DISTRICT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

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ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIFTH APPELLATE DISTRICT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Solicitor General, on behalf of the United States, hereby respectfully moves for leave to file, out of time, the attached brief as amicus curiae in support of appellant in this case.

At the Court's invitation, the United States previously filed a brief as amicus curiae at the jurisdictional stage of this case. We indicated at that time that the issues framed by the parties raised substantial federal questions, and we accordingly urged that the Court note probable jurisdiction. We also indicated that it was our view that neither the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA), 10 U.S.C. (& Supp. IV) 1408, nor 38 U.S.C. (& Supp. IV) 3101(a) barred the states from applying their community property law to divide

amounts of military retirement pay waived to receive veterans' disability benefits. Thus, with some qualifications, we supported the position of the appellee.

After appellant filed his brief on the merits, we began preparing this brief amicus curiae, in order to address the merits of the issues presented in greater detail. In the process of researching that brief, however, we uncovered certain additional legislative materials that caused us to reconsider that portion of our earlier brief addressing the preemptive effect of FUSFSPA (U.S. Br. 10-12). We now believe that our previously-expressed view on that question (although not our views on the argument based on 38 U.S.C. (& Supp. IV) 3101(a)) was in error. In particular, we have concluded that Congress, through various provisions of 10 U.S.C. (& Supp. IV) 1408, specifically precluded the states from treating waived retirement pay as community property divisible upon divorce.

Because the judgment below should be reversed if appellant prevails on either the argument based on FUSFSPA or the argument based on 38 U.S.C. (& Supp. IV) 3101(a), the modification of our views on the proper construction of FUSFSPA means that our position is now one in support of the appellant. Under Rule 36.2 of this Court's rules, the brief therefore should have been filed within the time allowed for the filing of the appellant's brief. Although it is out of time, we believe that consideration of this brief would provide material assistance to the Court in its review of this case. The brief, which is limited to the question of the proper construction of FUSFSPA, advances certain arguments and refers to legislative materials that are not presented by any other party.

For the foregoing reasons, the Solicitor General respectfully requests the Court to grant leave to file this brief as amicus curiae.

Respectfully submitted.

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OCTOBER 1988

QUESTION PRESENTED

The United States will address the following question: whether the Federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. (& Supp. IV) 1408, precludes the states from treating military retirement pay that has been waived to receive veterans' disability benefits as community property divisible by court order upon divorce.

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In the Supreme Court of the United States

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GERALD E. MANSELL, APPELLANT

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GAYE M. (MANSELL) FORBES

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIFTH APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The question presented in this case is whether a state, consistent with the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA),[1] 10 U.S.C. (& Supp. IV) 1408, and 38 U.S.C. (& Supp. IV) 3101(a), may treat military retirement pay that has been waived to receive veterans' disability bene-

[1] The parties refer to the Uniformed Services Former Spouses' Protection Act as the "Federal Uniformed Services Former Spouses' Protection Act" or "FUSFSPA." For consistency, we will do the same.

fits as community property divisible upon divorce. The United States has an interest in the proper resolution of the question, both because the military services branches and the Veterans Administration are charged with the administration of the statutes that regulate the distribution of military retirement pay and veterans' disability benefits, and because of the role that these agencies play in representing the interests of both active and retired military personnel and their spouses. At the invitation of the Court, the United States previously filed a brief amicus curiae at the jurisdictional stage of this case.

STATEMENT

1. a. As we stated in our earlier brief, this case involves the relationship between California community property law and two kinds of federal benefits: military retirement pay based on length of service, and veterans' disability benefits. Under various provisions of Title 10 of the United States Code, members of the military services who have served the required length of time may retire from active duty and receive retirement pay. 10 U.S.C. (& Supp. IV) 3911 *et seq.* (Army); 10 U.S.C. (& Supp. IV) 6321 *et seq.* (Navy and Marine Corps); 10 U.S.C. 8911 *et seq.* (Air Force); see generally *McCarty* v. *McCarty*, 453 U.S. 210, 213-215 (1981).[2]

In addition, veterans who become partially or totally disabled as a result of military service may

[2] Separate provisions, not at issue in this case, govern retirement for disability. 10 U.S.C. (& Supp. IV) 1201 *et seq.* A member of the military service may become eligible for disability retirement before he or she is eligible to receive retirement pay based on length of service (see, *e.g.*, 10 U.S.C. 1201(3)(B)).

be eligible for disability benefits from the Veterans Administration (VA) (38 U.S.C. 310 (wartime disability)); 38 U.S.C. 331 (peacetime disability)). A military retiree may receive veterans' disability benefits only to the extent that he or she waives a corresponding amount of military retirement pay (38 U.S.C. (& Supp. IV) 3104(a)(1), 3105). Because veterans' disability benefits, unlike military retirement pay, are exempt from taxation, such waivers are common.

Under the Federal Uniformed Services Former Spouses' Protection Act (10 U.S.C. (& Supp. IV) 1408), "disposable retired or retainer pay" may be regarded under state law as community property subject to division upon divorce (10 U.S.C. 1408(c)(1)).[3] According to the statute, "disposable retired or retainer pay" excludes amounts of retired or retainer pay waived in order to receive veterans' disability benefits under Title 38 (10 U.S.C. 1408(a)(4)(B)). FUSFSPA also provides that the federal government will garnish up to 50% of a service member's disposable retired or retainer pay to satisfy a court order dividing the pay as property in a divorce settlement or defining child support or alimony obligations (10 U.S.C. (& Supp. IV) 1408(d)(1) and (e)(1)). Finally, FUSFSPA contains a savings clause (10 U.S.C. 1408(e)(6)) stating

[3] Section 1408(c)(1) authorizes state courts to "treat disposable retired or retainer pay payable to a member * * * either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." Because this case concerns a community property law state, we will, when convenient, simply refer to Section 1408(c)(1) as authorizing the states to treat disposable retired or retainer pay as community property.

that the maximum use of federal enforcement remedies should not be construed to relieve a service member of additional unsatisfied obligations that can be enforced by other legal means.

This case also involves 38 U.S.C. (& Supp. IV) 3101(a), which provides that veterans' disability benefits "shall not be assignable except to the extent specifically authorized by law, and * * * shall be exempt from taxation, shall be exempt from the claim[s] of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." See *Rose* v. *Rose*, No. 85-1206 (May 13, 1987), slip op. 9-15; see also *Bennett* v. *Arkansas*, No. 86-6124 (Mar. 29, 1988) (Social Security Act anti-attachment clause).

b. California, like seven other States, applies community property principles to certain property acquired by the spouses during marriage. When a marriage is dissolved, the court granting the divorce decree divides the community assets equally between the spouses, while each spouse retains full ownership of any property acquired separately, such as property acquired before marriage. See Cal. Civ. Code § 4800(a) (West 1983 & Supp. 1985); *McCarty* v. *McCarty*, 453 U.S. at 216-217; *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 578-582 (1979) (application of California community property law to Railroad Retirement Act benefits).

Under California law, vested or nonvested rights to receive military retirement payments based on length of service are treated as community property to the extent that they derive from military service performed during the marriage. *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, cert. denied, 419 U.S. 825 (1974) (vested

(right); *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976) (nonvested right to receive pensions divisible as contingent property interest). Military retirement pay received after a marriage is dissolved may therefore be subject to division between the former spouses on the theory that the right to receive those payments is a community asset that was acquired during the marriage. *Casas* v. *Thompson*, 42 Cal. 3d 131, 139, 720 P.2d 921, 925, 228 Cal. Rptr. 33, 37, cert. denied, 479 U.S. 1012 (1986). Where a spouse elects to receive a higher retirement payment because of disability compensation, California law has considered the amount received in excess of the nondisability retirement pay he or she would have received to be the separate property of the disabled spouse. *In re Marriage of Stenquist*, 21 Cal. 3d 779, 785-787, 582 P.2d 96, 100-101, 148 Cal. Rptr. 9, 13-14 (1978).[4] How-

[4] In our previous brief (U.S. Br. 3-4), we cited to *In re Marriage of Jones*, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975), for the proposition that California law treats disability payments received after the dissolution of a marriage as the disabled member's separate property. The practical vitality of *Jones* has been curtailed, however, by subsequent California decisions (see U.S. Br. 14 n.9). The holding in *Jones* depended in part on the "nonvested" nature of the disability payments at issue. "Nonvested" benefits are now treated like vested benefits under California law (see *In re Marriage of Brown*, 15 Cal. 3d at 846-847, 544 P.2d at 566, 126 Cal. Rptr. at 638). The California Supreme Court has therefore held (*In re Marriage of Stenquist*, 21 Cal. 3d at 785, 789 n.11, 582 P.2d at 100, 102 n.11, 148 Cal. Rptr. at 13, 15 n.11) that *Jones*'s premise has been undermined insofar as nonvested disability benefits may be treated as community assets if they are based on a disability that occurred during the marriage and if they displace vested or nonvested nondisability benefits (*id.* at 99-102).

ever, California law treats any disability retirement pay or veterans' benefits received in lieu of retirement pay as community property susceptible to division. See *ibid.* (disability retirement pay); *In re Marriage of Daniels*, 186 Cal. App. 3d 1084, 231 Cal. Rptr. 169 (1986) (veterans' disability benefits received after waiver).

2. The parties to this appeal were married in 1954 and have six children. They separated in 1977. On May 29, 1979, the Merced County, California, Superior Court entered an interlocutory judgment dissolving the marriage. The dissolution order became final on June 4, 1979. J.S. App. D2. At the time of the divorce, appellant Mansell was retired from the Air Force on nondisability retirement, having served the requisite time. He was also eligible for veterans' disability based on a service-connected disability. He was then, and is now, receiving both Air Force retirement pay and, pursuant to a waiver of a portion of that pay, veterans' disability benefits. *Ibid.*[5]

On May 25, 1979, in preparation for the divorce, the parties entered into a property settlement agreement (J.S. App. D1). The agreement provided (*id.* at D2-D3) in part:

> [Appellant] shall make an allotment to [appellee] in an amount equalling fifty percent (50%) of the gross retirement pay and compensation from the Veterans' Administration accrued through [appellant's] employment with the United States Air Force, and shall increase such allotment from time to time in an amount necessary to equal fifty percent (50%) of the gross amount of any and all increases in such retirement pay and compensation from the Veterans' Administration that may occur in the future until the death of either party.

[5] The VA informs us that appellant receives approximately $482 per month in VA disability benefits and approximately $1,200 per month in Air Force retirement benefits.

The interlocutory divorce decree incorporated the property settlement agreement by reference (*id.* at A2), and also specifically required appellant to make the specified allotment of his gross retirement pay and veterans' disability benefits as provided for by the property settlement (*id.* at A3). The court that granted the divorce expressly reserved jurisdiction over the distribution of appellee's share of these benefits (*ibid.*). In addition, the decree noted that appellee had waived her right to receive any money or property from appellant as spousal support (*id.* at A2).

In 1983, appellant requested the Merced County Superior Court to modify the decree by removing the provision that required him to make the allotment of retirement pay and disability benefits (J.S. App. D2-D3). The superior court denied that request without opinion on August 10, 1983 (*id.* at B2).

Appellant appealed that decision to the California Court of Appeal, Fifth Appellate District, arguing that under FUSFSPA and 38 U.S.C. (& Supp. IV) 3101(a), California could not include the portion of retirement pay that he receives in the form of veterans' disability benefits in the total retirement payments to be divided between him and appellee as community property. The Court of Appeal rejected the argument based on FUSFSPA, relying on the decision of the Supreme Court of California in *Casas* v. *Thompson*, *supra* (J.S. App. D8-D11). *Casas* held

that after the enactment of FUSFSPA there was no federal preemption of state community property law as it applies to "gross" military retirement pay, and that FUSFSPA's limited federal enforcement remedy did not imply any limits on the State's ability to subject "gross" military retirement pay to community property rights and to enforce those rights through remedies other than federal enforcement (42 Cal. 3d at 143-151, 720 P.2d at 928-933, 228 Cal. Rptr. at 40-46). The Court of Appeal did not discuss the preemptive effect of 38 U.S.C. (& Supp. IV) 3101(a). It affirmed the superior court's judgment on January 30, 1987 (J.S. App. D1-D14).

Appellant sought review of the Court of Appeal's decision in the Supreme Court of California. Review was denied without opinion on April 29, 1987 (J.S. App. E1).

SUMMARY OF ARGUMENT

This brief will address only the issue of federal preemption raised by FUSFSPA: whether the states may characterize "gross" military retirement pay, that is, military retirement pay including those portions waived to receive veterans' disability benefits,[6]

[6] Appellant refers to the states' power to divide "[veterans'] disability benefits" as community property (*e.g.*, Appellant's Br. 14). We believe veterans' disability benefits are shielded from any such direct division by 38 U.S.C. (& Supp. IV) 3101(a) (see U.S. Br. 15). The issue that actually divides the parties is whether FUSFSPA restricts the states' power to divide that portion of *retirement pay* waived to receive veterans' disability benefits as community property. Although the waiver of retirement pay is dollar-for-dollar equal to the veterans' disability benefits received (except where all retirement pay is waived for a greater total of disability benefits), no claim is made in this case that appellee should be allowed to divide as community property actual monies received by appellant as veterans' disability benefits.

as community property susceptible to division in a divorce settlement.

Because family law is traditionally a realm of state law (*In re Burrus*, 136 U.S. 586, 593-594 (1890)), this Court has held that state family law is preempted only if that result has been " 'positively required by direct enactment' " (*Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979), quoting *Wetmore* v. *Markoe*, 196 U.S. 68, 77 (1904)), and if the conflicting state law does " 'major damage' to 'clear and substantial' federal interests" (*ibid.*, quoting *United States* v. *Yazell*, 382 U.S. 341, 352 (1966)). We believe that FUSFSPA can be read two ways, each of which suggests a different answer to the preemption inquiry required by *Hisquierdo*.

According to the first reading, Section 1408(c)(1) of the Act is the operative provision that grants the states the right to treat military retirement pay as community property, thereby overcoming the holding of *McCarty* v. *McCarty*, 453 U.S. 210 (1981), that federal law preempts any attempt by the states to treat military retirement pay as community property. Section 1408(c)(1), however, is a limited grant of authority. It permits the states to treat only the "disposable retired or retainer pay" as community property. The definitional provision of the statute (10 U.S.C. (& Supp. IV) 1408(a)(4)) defines "[d]isposable retired or retainer pay" to *exclude* amounts waived to receive veterans' disability benefits. Therefore, under the first reading, Congress has "positively required by direct enactment" that states *not* be allowed to characterize amounts of retirement

pay waived to receive veterans' disability benefits as community property.

The second reading interprets FUSFSPA as incorporating a more sweeping rejection of the *McCarty* decision, one meant to eliminate altogether any federal preemption of state courts' treatment of military retirement pay and related benefits. This view holds that Section 1408(c)(1) serves only to define those benefits subject to the limited federal enforcement remedy contained in the Act (10 U.S.C. (& Supp. IV) 1408(d)(1)). Moreover, according to this view, FUSFSPA's savings clause—which provides that FUSFSPA's limited federal enforcement remedies (10 U.S.C. (& Supp. IV) 1408(e)(1) and (4)(B))[7] do not prohibit claimants from enforcing "unsatisfied obligation[s]" that remain "by any means available under law other than the means provided under this section" (10 U.S.C. 1408(e)(6))—expressly disclaims that FUSFSPA has any preemptive effect.

Although in our initial brief we endorsed the second of these readings (U.S. Br. 6, 10-12), we have since concluded that the weight of the evidence better supports the first reading. First, the structure and language of the Act indicate that Section 1408(c)(1) is the only provision that affirmatively grants the

[7] FUSFSPA contains two limitations on the amount recoverable under federal enforcement remedies. If an application for payment is made under FUSFSPA alone, the military secretary concerned may pay out a maximum of 50% of a service member's disposable retired or retainer pay (10 U.S.C. 1408(e)(1)). If application for payment is made under both FUSFSPA and the Social Security Act's garnishment provision (42 U.S.C. (& Supp. IV) 659), the secretary may pay out a maximum of 65% of the service member's disposable pay (10 U.S.C. 1408(e)(4)(B)).

states the power to treat military retirement pay as community property. The savings clause, while sweeping in its language, is actually limited by reference, insofar as property rights in military pay are concerned, to the same restrictive definition of "disposable retired or retainer pay" that limits Section 1408(c)(1). Second, the legislative history of the Act supports the conclusion that Congress deliberately restricted its grant of power to the state courts. For example, Congress enacted FUSFSPA instead of an alternate Senate bill (S. 1453, 97th Cong., 1st Sess. (1981)), that clearly would have eliminated any federal preemption of state property awards.

The conflict between FUSFSPA and the state law treatment of waived retirement pay as community property is an important one that does "major damage" to "clear and substantial federal interests." We therefore conclude that the operation of state law on the amount of pay at issue here is preempted.

ARGUMENT

1. This Court has scrutinized claims that federal law preempts state family law with special care because of its recognition that domestic law is preeminently a state concern. See *In re Burrus*, 136 U.S. 586, 593-594 (1890). Thus, the Court has found that the Supremacy Clause requires that state family law be overridden only if two conditions are met. First, Congress must have " 'positively required by direct enactment' " that the state law be preempted. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *Wetmore* v. *Markoe*, 196 U.S. 68, 77 (1904)). Second, application of state family law must "do 'major damage' to 'clear and substantial' federal interests" before preemption will become nec-

essary. *Ibid.* (quoting *United States* v. *Yazell*, 382 U.S. 341, 352 (1966)).

Despite the strictness of the preemption test where state family law is at issue, the Court has on several occasions found the requisite federal intent to override state property law. In *Hisquierdo* v. *Hisquierdo*, *supra*, the ex-wife of a railroad employee claimed a portion of the expected value of the employee's retirement benefits as community property. The Court held that her claim conflicted with provisions of the Railroad Retirement Act of 1974 (RRA) (45 U.S.C. (& Supp. III) 231 *et seq.*) that, by specifying the employee as the Act's individual beneficiary and by protecting RRA benefits from attachment or anticipation, reflected a congressional determination that RRA benefits should reach the railroad retiree alone. Similarly, the Court has held that state community property laws could not obstruct the operation of the survivorship rules of federal savings bond and military life insurance programs. See *Yiatchos* v. *Yiatchos*, 376 U.S. 306 (1964); *Free* v. *Bland*, 369 U.S. 663 (1962); *Wissner* v. *Wissner*, 338 U.S. 655 (1950). And, in *McCurdy* v. *Essig*, 199 U.S. 382 (1905), the Court refused to allow state inheritance laws to supercede a federal homestead law in determining the path of succession federal land was to follow after the death of a settler.[8]

[8] In *Rose* v. *Rose*, No. 85-1206 (May 18, 1987), the Court concluded that various federal provisions protecting veterans' disability benefits from invasion, including the anti-attachment clause, 38 U.S.C. (& Supp. IV) 3101(a), did not warrant a finding that federal law preempted child support obligations defined by state law. The Court found that the disability benefits were intended for both the veteran and his dependents; thus, state law allocating a portion of the payments to the dependents worked no injury to federal interests

The Court's most recent decision finding federal preemption of state community property law bears directly on this case. In *McCarty* v. *McCarty*, 453 U.S. 210 (1981), the ex-wife of a service member claimed a portion of his nondisability military retirement pay as community property in a divorce settlement. After thoroughly reviewing the statutory context, the Court concluded that Congress intended military retirement pay to be a personal entitlement (*id.* at 223-232); that treating military retirement pay as community property would frustrate the protective and personnel management objectives underlying that congressional intent (*id.* at 232-235); and that the state application of community property law to such compensation was therefore preempted (*id.* at 235). The Court invited the Congress to act, should it wish to modify the Court's conclusion (*id.* at 235-236 (citations omitted)):

> We recognize that the plight of an ex-spouse of a retired service member is often a serious one. * * * Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. * * * [I]n no area has the Court accorded Congress greater deference than in the conduct and control of military affairs.

(*Rose*, slip op. 13). The plurality in *Rose* recognized, though it did not rely upon, the special status traditionally accorded family support obligations as opposed to community property claims of a more "amoral business" nature (*id.* at 11-13 (citing *Wissner*, 338 U.S. at 660)). Two justices relied on the distinction to find that 38 U.S.C. (& Supp. IV) 3101(a) did not preempt state law (*Rose*, slip op. 1-4 (O'Connor, J., with whom Stevens, J., joined, concurring)).

In 1982, Congress responded to the decision in *McCarty* by passing the Federal Uniformed Services Former Spouses' Protection Act (10 U.S.C. (Supp. IV) 1408). As explained above, the Act authorized the states to treat nondisability military retirement pay as community property under state law and provided a federal enforcement remedy for ex-spouses seeking to effectuate court-ordered property settlements, child support and alimony awards. Congress made clear that it intended FUSFSPA to "revers[e] the decision of the United States Supreme Court in the case of *McCarty* v. *McCarty*." H.R. Conf. Rep. 97-749, 97th Cong., 2d Sess. 165 (1982).

2. The *McCarty* decision and the enactment of FUSFSPA shape the federal preemption inquiry required in this case. In our view, two readings of the *McCarty* decision and its "reversal" by Congress are possible. Each indicates a different answer to the question of whether Congress has "positively required by direct enactment" that state community property laws should give way to federal rules regarding the treatment of amounts of retirement pay waived so that a service member may receive veterans' disability benefits.

First, Congress, in enacting FUSFSPA, may have intended to carve out an exception to the preemption recognized in *McCarty*, but, outside the area of that exception, to continue the preemption of any application of state community property law. In this view, by specifically authorizing state courts to treat "disposable retired or retainer pay" as community property (10 U.S.C. 1408(c)(1)), Congress meant to allow those parts of military retirement pay that meet the definition of "disposable retired or retainer pay" to be treated as community property, but only those parts. Because Section 1408(a)(4) defines

"disposable retired or retainer pay" as "the total monthly retired or retainer pay to which a member is entitled" *less* certain other amounts, including, inter alia, amounts waived in order to receive veterans' disability benefits (see 10 U.S.C. 1408(a)(4)(B) ("amounts waived in order to receive compensation under * * * title 38")),[9] the states on this reading would be precluded from treating gross retirement pay, including amounts waived to receive veterans' disability benefits, as community property susceptible to division in a divorce settlement.

Alternatively, it is possible to read Congress's reaction to *McCarty* a different way. Under this alternative reading, Congress intended to reject the preemption analysis of *McCarty* altogether, thereby removing any significant federal constraint on the states' ability to treat military retirement pay as community property. According to this reading, the Act focuses on "disposable retired or retainer pay" only because the federal enforcement remedy provided in the Act (10 U.S.C. (& Supp. IV) 1408(d)(1)) is limited to amounts defined by application of that term (see *Casas*, 42 Cal. 3d at 147-151, 720 P.2d at 931-933, 228 Cal. Rptr. at 43-46). But the federal enforcement remedy would not be construed

[9] Other amounts excluded from the definition of "disposable retired or retainer pay" are amounts owed by the service member to the United States (10 U.S.C. 1408(a)(4)(A)); amounts withheld for federal employment taxes, and for fines and forfeitures ordered by courts-martial (10 U.S.C. 1408(a)(4)(B)); federal, state and local income taxes withheld (10 U.S.C. 1408(a)(4)(C)); taxes withheld under 26 U.S.C. (& Supp. IV) 3402(i) (10 U.S.C. (& Supp. IV) 1408(a)(4)(D)); amounts received as disability military retirement pay (10 U.S.C. (& Supp. IV) 1408(a)(4)(E)); and amounts deducted towards an annuity for the spouse or ex-spouse (10 U.S.C. 1408(a)(4)(F)).

to restrict the authority of the states to treat gross retirement pay as community property. This reading of the Act relies for support on FUSFSPA's savings clause, which provides that (10 U.S.C. 1408 (e)(6) (emphasis added)):

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, *or other payments* required by a court order on the grounds that payments made out of disposable retired or retainer pay [under the federal enforcement remedies available under FUSFSPA (10 U.S.C. (& Supp. IV) 1408(d)(1)) and the Social Security Act (42 U.S.C. (& Supp. IV) 659)] * * * have been made in the maximum amount permitted under * * * [the provisions in Section 1408(e) limiting the amount recoverable under the federal enforcement remedies]. Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under * * * [the federal enforcement remedies] has been paid.

There is evidence to support both readings, and we originally concluded (U.S. Br. 6, 10-12) that the second reading more accurately describes the congressional action. Under this view, the state courts would be free to characterize income waived to receive veterans' disability benefits as community property[10]

[10] Concerns about the anti-attachment provision that protects veterans' disability benefits, 38 U.S.C. (& Supp. IV) 3101(a), would have to be addressed separately, as we did in our opening brief (U.S. Br. 12-17). We concluded there (*id.* at 15) that Section 3101(a) would operate to protect from attachment the amount received as veterans' disability benefits after a waiver. Thus, although a state court could calculate the community property award due an ex-spouse on the basis of a service member's "gross" retirement income, that award could only be satisfied so far as possible out of the member's "disposable" retirement income (U.S. Br. 15-16).

After further research and reflection, however, we believe the weight of the evidence better supports the first reading. We have come to that conclusion for a number of reasons.

a. Although it is clear from the legislative history of FUSFSPA that Congress intended to "reverse" this Court's decision in *McCarty* (see *e.g.*, H.R. Conf. Rep. 97-749, 97th Cong., 2d Sess. 165 (1982); S. Rep. 97-502, 97th Cong., 2d Sess. 1-3, 16 (1982)), here as elsewhere it is important to begin by examining the actual language of the statute to determine how Congress sought to accomplish that result. The statute itself does not mention *McCarty* or federal preemption of state community property rules. Nevertheless, Congress was legislating against the understanding that this Court had authoritatively construed preexisting federal law as precluding the states from treating federal military retirement pay as community property divisible upon divorce. Consequently, in order to overcome the holding of *McCarty*, it was necessary for Congress to enact an affirmative grant of authority giving the states the power to treat military retirement pay as community property.[11]

[11] The California Supreme Court in *Casas* concluded (42 Cal. 3d at 144, 720 P.2d at 929, 228 Cal. Rptr. at 41) that no such affirmative grant of authority is necessary because *McCarty*'s finding was one of "implied preemption," based on a contextual analysis of "all relevant facts and circumstances" (42 Cal. 3d at 145, 720 P.2d at 929, 228 Cal. Rptr. at 41), and those facts and circumstances changed by reason of the enactment of FUSFSPA. As the court put it, the appropriate question to ask was "[whether,] were *McCarty* to be decided

The only section of FUSFSPA that can reasonably be read as conferring such a grant of authority on the states is Section 1408(c)(1). That section provides (10 U.S.C. 1408(c)(1)):

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

This clearly gives state courts the authority to treat military retirement pay as community property, *i.e.*, "property of the member and his spouse," if such treatment is "in accordance with the law of the jurisdiction of such court." Thus, Section 1408(c)(1) would appear to serve as the grant of authority required to overcome the holding of *McCarty*. Section 1408(c)(1), however, is limited on its face. It authorizes state courts only to treat "disposable retired or retainer pay" as property in accordance with the law of the jurisdiction. "Disposable retired or retainer pay" is in turn defined elsewhere in the statute (10 U.S.C. (& Supp. IV) 1408(a)(4)). That definition specifically *excludes* retired or retainer pay "waived in order to receive compensation under * * * title 38" (10 U.S.C. 1408(a)(4)(B))—the amount of veterans' disability benefits at issue here. Thus, if Section 1408(c)(1) constitutes the source of authority for allowing states to treat military retirement pay as community property, that authority does not extend to amounts of military retirement pay waived to receive veterans' disability benefits. Such waived retirement pay, along with the other amounts of gross retirement pay excluded from the definition of "disposable retired or retainer pay," would continue to be subject to the rule of federal preemption announced in *McCarty*.[12]

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after FUSFSPA, would the Supreme Court imply preemption?" *Casas*, 42 Cal. 3d at 145, 720 P.2d at 929, 228 Cal. Rptr. at 41. In our view, however, the relevant question is not what this Court would decide in a hypothetical situation not presented, but rather what *Congress* intended when it enacted FUSFSPA. Congress clearly legislated against the understanding that preexisting federal law, as authoritatively construed by this Court, preempted the application of community property law to military retirement benefits. See, *e.g.*, S. Rep. 97-502, *supra*, at 2-3. Congress sought to modify that conclusion, but it could not do so by declaring that *McCarty* was overruled, as an appellate tribunal would; nor could it, by changing the "relevant facts and circumstances" relied upon in *McCarty*, overrule the Court's judgment. The only way Congress could overcome the ruling in *McCarty* was by enacting legislation specifying a different legal rule than the one announced by this Court in that decision. Congress clearly understood that to be the case, and legislated accordingly.

[12] Although *McCarty* dealt with military retirement pay *received* by a service member, under its rationale state law treatment of military retirement pay *waived* to receive veterans' disability benefits would also be preempted by federal law. A number of state courts had come to the same or similar conclusion before *McCarty* because of the specially protected status of veterans' disability benefits, as indicated by the anti-attachment clause (38 U.S.C. (& Supp. IV) 3101(a)). *See, e.g., Rickman* v. *Rickman*, 124 Ariz. 507, 605 P.2d 909 (Ct. App. 1980); *Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981); *Arrambide* v. *Arrambide*, 601 S.W.2d 197 (Tex. Ct. App. 1981); *Ex parte Johnson*, 591 S.W. 453 (Tex. 1979); see also *Miller* v. *Miller*, 96 N.M. 497, 632 P.2d 732 (1981) (applying pre-*McCarty* Texas law). But see *Stroshine* v. *Stroshine*, 98 N.M. 742, 652 P.2d 1193 (1982) (post-*McCarty*); *In re Marriage of Kittleson*, 21 Wash. App. 344, 585 P.2d 167 (1978).

The only other provision of FUSFSPA that could even arguably be said to confer authority on the states to treat military retirement pay as community property is the savings clause, Section 1408(e)(6). But although the savings clause is written in quite broad terms, it does not purport, as does Section 1408(c)(1), to confer authority upon the states. Instead, it is written so as to *preserve* existing state authority from any inference that it has been displaced by the new remedial mechanism established by Section 1408(d)(1). Because Congress legislated with the understanding that *McCarthy* had eliminated any authority on the part of the states to treat military retirement pay as community property, such a savings clause would do nothing to accomplish what Congress intended: to overcome the holding in *McCarty*. Thus, the savings clause's reference to "alimony, child support, *or other payments*" (10 U.S.C. 1408(e)(6) (emphasis added)) must be construed to refer to payments that the states had the authority to mandate prior to the enactment of FUSFSPA—including "payments" in satisfaction of community property awards from assets other than military retirement pay (see 10 U.S.C. (& Supp. IV) 1408(d)(5); H.R. Conf. Rep. 97-749, *supra*, at 166)—but not to include payments that the states had no authority to compel under the rationale of *McCarty*.[13]

[13] For example, an ex-spouse may have been awarded 50% of a service member's disposable retired pay as community property and an additional amount equal to 20% of the disposable retired pay as child support or alimony. Applying under both 10 U.S.C. (& Supp. IV) 1408(d)(1) and 42 U.S.C. (& Supp. IV) 659, the ex-spouse could recover a maximum of 65% of the member's disposable retired pay (10 U.S.C. 1408(e)(4)(B)). However, the ex-spouse could, according to Section 1408(e)(6), bring a contempt action in a state court to recover the remaining 5% owed.

Moreover, by its own terms, Section 1408(e)(6) preserves only an ex-spouse's right to collect alimony, child support, or other payments "*required by a court order*" (10 U.S.C. 1408(e)(6) (emphasis added)). "Court order" is also a term that is specifically defined for the purposes of the Act (10 U.S.C. (& Supp. IV) 1408(a)(2)). As amended in 1984 (see Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, Tit. VI, § 643(a), 98 Stat. 2547), that definition refers to a final decree issued by any court that, "in the case of a division of property," specifically provides for the payment of an amount "from the disposable retired or retainer pay of a member" (10 U.S.C. (& Supp. IV) 1408(a)(2)(C)). The requirement that a "court order" specify "disposable" retired or retainer pay as the source of a community property award is consistent with the inference drawn from 10 U.S.C. 1408(c)(1) that courts have authority to treat only "disposable" retired or retainer pay as community property, and no more.[14] More importantly, the savings clause's limitation to additional property awards made out of "disposable retired or retainer

[14] The 1984 amendments underscore the importance Congress attaches to the restrictive definition of a "court order" where property rights are concerned. The definition of "court order" in Section 1408(a)(2) as originally passed had required all court orders recognized by the Act, including those awarding child support and alimony, to stipulate the source of the award as the "disposable retired or retainer pay" of the service member (10 U.S.C. (& Supp. IV) 1408(a)(2)(C)). In 1984, however, Congress amended the statute to provide that the limitation does not apply to court orders awarding child support and alimony (S. Rep. 98-500, 98th Cong., 2d Sess. 220 (1984)). But it deliberately retained this requirement for court orders directing divisions of property (10 U.S.C. (Supp. IV) 1408(a)(2)(C)). See S. Rep. 98-500, *supra*, at 220.

pay" leaves no other language in the savings clause that could serve as a possible source of authority for state courts to characterize *gross* retired or retainer pay as community property susceptible to division (see 10 U.S.C. 1408(e)(6)).

b. The complete legislative history is also, on balance, more consistent with the view that Congress meant to limit the community property authority of the states to "disposable" rather than gross military retirement pay. First, the section-by-section analysis of FUSFSPA's predecessor bill (S. Rep. 97-502, *supra*, at 12-28), incorporated by reference into the conference report on FUSFSPA (H.R. Conf. Rep. 97-749, *supra*, at 168) discusses (S. Rep. 97-502, *supra*, at 16-17) the Senate's intent to overcome the *McCarty* decision in the course of its analysis of Section 1408(c)(1), implying that the drafters of the report considered Section 1408(c)(1) the provision that accomplished that result. By contrast, the Senate merely restated (S. Rep. 97-502, *supra*, at 22) the savings clause (10 U.S.C. 1408(e)(6)) in its explication of that section. It did not intimate that the savings clause had any wide-ranging implications. The final conference report also describes the approach of the Act as one that "would permit *disposable* military retired pay to be considered as property in divorce settlements under certain specified conditions" (H.R. Conf. Rep. 97-749, *supra*, at 165 (emphasis added)).[15]

[15] On the other hand, a Senate report contains several references to the Congress's intent to "return to the States the authority to treat military pensions in the same manner as they treat other retirement benefits" (S. Rep. 97-502, *supra*, at 10) and "to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts * * * to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible" (*id.* at 16). The report's tone generally emphasizes "the intent of section 1408 * * * to give the [state] courts * * * *great latitude* in dealing with uniformed service retired or retainer pay" (*id.* at 17 (emphasis added)). These statements lend some support for a broader view of the authority Congress intended to confer on the states. The bill that was the subject of S. Rep. 97-502, *supra* (S. 1814, 97th Cong., 2d Sess. (1981)) was modified by the House and Senate into the current form of FUSFSPA and attached as a House amendment to a Department of Defense authorization statute (Department of Defense Authorization Act, 1983, Pub. L. No. 97-252, Tit. X, § 1002(a), 96 Stat. 730). The conference report on the Defense bill (H.R. Conf. Rep. 97-749, *supra*, at 168) incorporates by reference those portions of the section-by-section analysis in S. Rep. 97-502, *supra*, that describe provisions similar to those ultimately adopted.

Second, Congress specifically considered an alternative to FUSFSPA sponsored by Senator DeConcini that clearly could have given the states broad authority to treat gross military retirement pay as community property. See *Uniformed Services Former Spouses Protection Act: Hearings on S. 1453, S. 1648, and S. 1814 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 1st and 2d Sess. (1981-1982) [hereinafter *Hearings*]. Senate Bill 1453 (S. 1453, 97th Cong., 1st Sess. (1981)) would have added to Title 10 of the United States Code a one-paragraph provision generally entitled "Nonpreemption of State Law." The proposed section provided that (*ibid.*):

> * * * the law of the State in which the dissolution of marriage proceeding was instituted shall be dispositive on all matters pertaining to the division of any retired, retirement, or retainer

pay to which such member or former member is entitled or will become entitled.

Congress, however, rejected the DeConcini bill in favor of the carefully targeted and more limited authorization contained in FUSFSPA.[16]

Third, there is every indication that Congress realized that the exclusions it built into the Act's definition of "[d]isposable retired or retainer pay" (10 U.S.C. (& Supp. IV) 1408(a)(4)) could work to reduce the size of the "pie" of military retirement pay susceptible to division by the state courts. In succcessive hearings held by the Senate Subcommittee on Manpower and Personnel, the effects of excluding "amounts waived in order to receive compensation under title 5 [Civil Service compensation] or title 38 [Veterans' disability benefits]" (10 U.S.C. 1408(a)(4)(B)), from "disposable retired or retainer pay" were discussed (see *Hearings* 131-132, 133-134, 147-148, 166-167). American Bar Association (ABA) witnesses confirmed that under the statute, a service member who accepted employment in the Civil Service and waived military retirement pay to receive Civil Service compensation could "effectively deprive[] [his spouse] of her property while the former military member [would] suffer[] no diminu-

[16] As would be consistent with a broader rejection of *McCarty*, Senator DeConcini recommended (*Hearings* 23) that his bill operate retroactively. The enforcement remedy of FUSFSPA as ultimately adopted operated prospectively, although FUSFSPA did not prohibit courts from reopening divorce decrees for modification in light of the Act. See § 1006(a)-(b), 10 U.S.C. (Supp. IV) 1408 note; H.R. Conf. Rep. 97-749, *supra*, at 167-168; S. Rep. 97-502, *supra*, at 27-28; 128 Cong. Rec. 18317 (1982) (remarks of Representative Schroeder, sponsor of FUSFSPA House amendment).

tion in income" (*id.* at 131).[17] See also *id.* at 133-134 (discussing incentive to service members to seek out "sheltered civilian employment"); *id.* at 147-149 (noting problems presented to service *members* in dual compensation situations[18]); *id.* at 166-167 (sug-

[17] If the discussion had referred only to waivers made to receive veterans' disability benefits, it would be possible to read this statement as referring to the protection provided by 38 U.S.C. (& Supp. IV) 3101(a), the anti-attachment clause protecting veterans' benefits. This is not possible where the discussion concerns Civil Service compensation, which is protected by no similar flat prohibition against attachment.

[18] This discussion during the Hearings suggests that Senate drafters were thinking in part of problems created by dual compensation regulations when they excluded waived military retirement pay from the definition of disposable retired or retainer pay. Under federal law at that time, dual compensation regulations put service members who began work for the Civil Service in a "Catch 62." At retirement, military service years could be credited towards civilian length-of-service requirements if the worker waived receipt of his or her military retirement pay (see 5 U.S.C. (1976 ed.) 8332(c) and (d)(2)). However, because the worker had contributed to the Social Security fund during his or her military service years, the military service years also entitled a worker to Social Security at age 62. Thus, a worker who retired at age 60 would draw a Civil Service annuity based on the full length of federal service for two years. At age 62, the worker's entitlement to Social Security would begin; it could not be waived, nor could military service years be credited towards *both* types of retirement compensation. Thus, the worker's years of military service were dropped for purposes of calculating the size of the civilian retirement pay (see 5 U.S.C. (& Supp. V 1981) 8332(j)), which was then lowered. As presented at the Hearings (*Hearings* 147-149), if an ex-spouse's interest in waived military pay continued and was satisfied out of the now-lowered civilian retirement pay, a worker would be left with a greatly reduced income. Federal law has now been amended to allow continued Civil Service credit for years of

gesting waived-pay exclusions were inserted by drafters in order to resolve problems of service members in dual compensation situations[19]). See also H.R. Rep. 100-563, 100th Cong., 2d Sess. 256-257 (1988) (discussing ability of service members to shield military income by increasing amounts withheld for tax purposes[20]). The interpretations of the ABA witnesses was not challenged during the hearings, nor was the bill changed in any way with respect to the definition of "disposable retired or retainer pay."

Finally, it is significant that for purposes other than division as community property, Congress has deliberately included amounts equal to retirement pay waived for veterans' disability benefits in amounts subject to federal garnishment. In particular, under 42 U.S.C. (& Supp. IV) 659, the provision allowing garnishment of federal pay for child support and alimony obligations, "remuneration for employment" is specifically defined to include vet-

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military service if a service member makes back contributions towards a Civil Service annuity for all periods of military service (see Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, §§ 306-307, 96 Stat. 795-798; 5 U.S.C. 8332(c)(1) and (j)(2)).

Although there were expressions of concern that protecting service members against the "Catch 62" could in turn unfairly deprive ex-spouses, these concerns were offset in part by the recognition that state courts generally could adjust property awards for equitable reasons. See S. Rep. 97-502, *supra*, at 10-11 (discussing factors state courts could consider in making *equitable* property awards, including needs, skills, other income).

[19] See note 18, *supra*.

[20] The Committee report suggests (*ibid.*) that ex-spouses may claim tax credits to regain portions of the tax withheld by service members.

erans' benefits received after a waiver of retirement pay (42 U.S.C. (& Supp. IV) 662(f)(2)). The deliberate inclusion of disability benefits received in lieu of retirement pay under 42 U.S.C. (& Supp. IV) 659 suggests that the exclusion of amounts equal to such benefits under 10 U.S.C. 1408(a)(4)(B) was equally deliberate.

3. The protection afforded federal payments to disabled veterans reflects a long-held congressional concern for the needs of those service members. Congress has carefully defined the extent of that protection. Compare 38 U.S.C. (& Supp. IV) 3101(a) (prohibiting creditors' attachment of disability benefits) with 42 U.S.C. (& Supp. IV) 659, 662(f)(2) (allowing federal garnishment of veterans' benefits received after waiver for support obligations). By its enactment of FUSFSPA, Congress continued to define the balance of protection it felt appropriate. It expressly distinguished the strength of the claim represented by support obligations from the strength of the claim represented by community property law. Compare 10 U.S.C. (& Supp. IV) 1408(a)(2)(B)(i)-(ii), 1408(d)(1) (making FUSFSPA federal enforcement remedy available to court-ordered child support and alimony claims generally) with 10 U.S.C. (& Supp. IV) 1408(a)(2)(C) and (d)(1) (making FUSFSPA federal enforcement remedy available only for those community property claims contained in court orders stipulating "disposable retired or retainer pay" as source of award). Cf. *Rose*, slip op. 1-4 (O'Connor, J., concurring) (recognizing distinction between community property and support obligations); *Hisquierdo*, 439 U.S. at 586-587 (same). Against this background, it is not surprising that Congress declined to authorize the states to treat as

community property amounts of retirement pay waived in order to receive veterans' disability benefits.

The difficult question of statutory construction presented by this case comes about because of the intersection of two different sources of entitlement: military retirement pay and veterans' disability benefits. Congress in FUSFSPA clearly indicated its policy judgment that a former spouse should be allowed to share in military retirement pay. Equally clearly, Congress has indicated in 38 U.S.C. (& Supp. IV) 3101(a) that a former spouse should not be allowed to share, at least directly, in veterans' disability benefits. The difficulty arises because Congress has not allowed these two entitlements to be entirely cumulative: to get the full measure of disability benefits a service member must give up some of his or her military retirement pay. In these circumstances, Congress could with equal logic have directed either that the full amount of the spouse's claim to military retirement pay be attributed to what the service member obtains in the veterans' disability benefits, or it could have embraced the opposite conclusion. The task is to discern which of these two possible solutions Congress chose. The legislative materials we have discussed point with greater certainty to the choice that more completely guards the veterans' disability benefits.

As the Court found in *Hisquierdo*, 439 U.S. at 585, "[i]t is for Congress to decide how these finite funds are to be allocated. The statutory balance is delicate." To allow the states to enforce property law that upsets the balance of protection that the Congress has established would work "major damage" to "clear and substantial state interests" (see *Hisquierdo*, 439 U.S. at 581). We therefore submit that

the state court action here—the characterization of military retirement pay waived to receive veterans' disability benefits as community property—is preempted by federal law.

CONCLUSION

The decision of the California Court of Appeal should be reversed and remanded for any further proceedings that may be necessary.

Respectfully submitted.

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No. 87-201

In The

Supreme Court of the United States

October Term, 1987

GERALD E. MANSELL,

Appellant,

v.

GAYE M. MANSELL,

Appellee.

On Appeal from the Court of Appeal of California,
Fifth Appellate District

APPELLEE'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

The parties are former spouses. Appellant, a retired member of the Air Force receives Air Force retirement pay and Veterans Administration (VA) disability benefits. In order to receive VA benefits, he has waived a portion of his Air Force retirement pay equal to the amount of the payments he receives from the VA.

The questions are:

1. Whether either the Federal Uniformed Services Former Spouses Protection Act, 10 U.S.C. (and Supplement IV) 1408, or the anti-attachment provision that applies to VA benefits, 38 U.S.C. 3101(a), requires that Appellant's VA benefits be excluded in calculating Appellee's community property interest in Appellant's Air Force retirement pay.

2. Whether a stipulation, incorporated into a final judgment not appealed within the time allowed by law, and the lapse of four years before requesting relief, prevents Appellant from seeking modification of the judgment.

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JURISDICTIONAL GROUNDS

This Court improperly noted probable jurisdiction on June 27, 1988. The basis of the notation was the allegation by Appellant that California's courts have interpreted 38 U.S.C. 3101 as not preventing states from awarding Veterans Administration Disability Benefits to former spouses as community property. California courts have never held such, and have expressly held otherwise when stating benefits are separate property and belong to the spouse receiving the benefits.

The Appellee in this matter has made no attempt to attach, levy, or seize any of the disability benefits received by Appellant.

There has been no interpretation by the state courts of a federal statute as required under 28 U.S.C. 1275(2) in order to invoke the jurisdiction of this Court.

STATEMENT OF THE CASE

This matter comes before the Court on a failed attempt by Major Mansell to modify a judgment to which he stipulated.

The trial court denied Maj. Mansell's Motion for Order Modifying Interlocutory and Final Judgment (Clerk's Transcript (hereafter CT) p. 40) and Motion for Reconsideration (CT p. 61) without issuing findings of fact or conclusions of law (CT p. 93 & 94). The California Court of Appeals affirmed the trial court's ruling (Appellant's Jurisdictional Statement (JS) p. D-1). The California Supreme Court denied hearing the case (JS p. E-1).

Maj. Mansell, and Gaye Mansell were married in July 1954 and separated in May of 1977. At the time of separation, Maj. Mansell was retired from the United States Air Force with a fully vested longevity retirement.

In July 1977, Maj. Mansell applied for disability benefits through the Veteran's Administration and received them, but waived that portion of the longevity pension

that equalled the Veterans' Administration pension that he was going to receive.

An action to dissolve the marriage of the parties was filed in the Superior Court of the County of Merced and both parties made a general appearance in that action and were represented by counsel.

In May of 1979 a Property Settlement Agreement (CT p. 6) was entered into that was signed by both the parties and their counsel. The agreement resolved all issues between the parties, including dividing the marital property, providing for custody, visitation, and support. That portion of the agreement that is relevant to the matter before the Court is as follows:

> "**Husband** ***agrees*** that Wife's share of the ***retirement pay and compensation from the Veterans' Administration*** accrued through Husband's employment by the United States Air Force ***shall be paid directly to Wife by allotment*** through the Air Force accounting system, and **that such *allotment shall,*** at all times, ***equal 50% of the gross retirement pay*** earned by Husband, ***a portion of which includes compensation from the Veterans' Administration.*** We also agree that the Court may reserve jurisdiction over distribution of the retirement pay and compensation from the Veterans' Administration earned by the Husband through his employment with the United States Air Force." (CT p. 8) (Emphasis Added)[1]

The provision contained in the agreement was incorporated expressly into the Interlocutory Judgment (CT p. 3) that was filed in the trial court. **The judgment was entered on an uncontested basis** in May of 1979.

---

[1] Maj. Mansell's brief on the merits is incorrect at p.1 when he stated the Interlocutory Judgment was set forth in full in the Jurisdictional Statement. That Judgment incorporated the Property Settlement Agreement containing the above cited provision which was **not** set forth in his Jurisdictional Statement.

The Final Judgment of Dissolution (CT p. 18) was filed in June of 1979.

On June 26, 1981, this Court issued its decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981), which indicated that California community property laws in so far as they required the division of vested military retirement benefits were preempted by federal law.

In September of 1982 Congress passed the Federal Uniformed Services Former Spouses Protection Act (hereafter FUSFSPA) 10 U.S.C. 1408. That Act became effective on February 1, 1983.

In May of 1983 Maj. Mansell filed his Motion for Modification of the judgement. Maj. Mansell was seeking to have the judgment modified **to strike any reference on his part to pay any portion of his retired pay or disability pay to Gaye Mansell.** The motion was filed four years after the making of the agreement by Maj. Mansell, and two years after the decision rendered by this Court in *McCarty v. McCarty*, supra.

On August 10, 1983, the Superior Court of the County of Merced denied the motion and a Motion for Reconsideration filed by Maj. Mansell.

The matter was appealed in a timely fashion to the intermediate court of appeal in California which rendered its opinion on January 30, 1987, affirming the trial court's decision.

On April 29, 1987, the California Supreme Court denied Maj. Mansell's petition for review.

Throughout the course of this matter, there were no garnishments attempted, issued, sought or granted against the disability pay received from the Veteran's Administration by Maj. Mansell.

SUMMARY OF THE ARGUMENT

Maj. Mansell, represented by counsel, entered into a written stipulation dividing his military retired pay. That

stipulation was incorporated into a final divorce judgment in 1979.

Four years later, after this Court rendered its decision in *McCarty v. McCarty*, supra, and after Congress enacted FUSFSPA, Maj. Mansell brought a motion to modify the judgment by deleting his obligation to pay retired pay, or VA disability benefits. No attempt was being made to attach, levy, or seize any of his VA disability benefits.

His motion was denied, and his attempts at appeal failed.

At the time of the judgment California courts divided the longevity retired pay accrued during active service while married. When calculating longevity pay, California courts took into account that portion of the longevity pay voluntarily waived by the military spouse in order to receive VA disability benefits. It is not uncommon for veterans to seek this avenue as the VA disability pay is tax free while the longevity pay is subject to appropriate federal and state taxes. California courts held that the election by the military spouse in these instances was a violation of the doctrine that a spouse, through acts solely within the control of that spouse, cannot convert community property into separate property.

On June 26, 1981, this Court rendered its decision in *McCarty*. That case held military retired pay could not be divided between the spouses in a divorce action. The rationale of that decision was a finding there was an overall public policy contained in the military retirement scheme which pre-empted the state courts' actions.

In response, Congress **re-established public policy** by enacting FUSFSPA. The stated purpose of the Act was to overrule *McCarty* and allow state courts once again to divide military retired pay as it had before *McCarty*. The provisions of the Act apply to decisions rendered before and after June 25, 1981, the day before *McCarty*. The rationale of *McCarty* was expressly overruled by the very firm statement of public policy by Congress to protect former spouses of military personnel.

38 U.S.C. 3101(a) prevents the attachment, levy, or seizure of VA disability benefits. California courts have agreed with that provision and have not sought to do anything that is in violation of that provision. California courts have expressly held that disability pay is separate property, whether received from the VA or other disability insurance providers. However, California courts have not allowed a person who receives a longevity pension and disability pay to convert the longevity into disability at the expense of the former spouse. Such conversion of property rights is unjust and runs afoul of the express policy of the Congress as reflected in the enactment of FUSFSPA.

Appellant is saying the conversion is protected by federal law. The conversion is allegedly condoned by using the shield of 3101(a) as a sword to cut-off the former spouse's rights. Rather than converting Maj. Mansell's property, as he claims, the only conversion resulting from such an argument is from community to separate property by the military spouse.

Adopting the analysis set forth by Maj. Mansell **allows military spouses to circumvent the intentions of Congress** when it swiftly reasserted established public policy by enacting FUSFSPA. The circumvention is proven by the practical effect of his analysis. As indicated in the examples (pp. 20 & 23 of this brief), this effect turns an emphatic public policy into a token gesture. Congress **cannot** have intended this result.

Another practical result of Appellant's argument would be the **reopening of every divorce case in the United States involving military retirement.** The common law principles of **res judicata** and **finality would no longer have any meaning,** nor would any time limitations against re-opening apply.

There is nothing in Maj. Mansell's argument justifying the special treatment he is seeking from this Court.

ARGUMENT

I. NEITHER AN EXPRESS NOR AN IMPLIED FEDERAL PRE-EMPTION AS FOUND IN *HISQUIERDO* OR *McCARTY* APPLIES TO THE FACTS OR LAW OF THIS CASE

This Court has stated consistently that it will not interfere with the laws of the individual states when dealing with family law. As indicated by this Court several times, and most recently in the case of *Rose v. Rose*, No. 85-1206 (May 18, 1987), 481 U.S. ___, 107 S.Ct. 2029:

> "We have consistently recognized that '[t]he whole subject of the domestic relations of the husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.' [Citations] 'On the rare occasion when state family law has come into conflict with federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by directed enactment that state law be pre-empted.' [Citation] Before a state law governing domestic relations will be overridden, it 'must do 'major damage' to 'clear and substantial' federal interests.' [Citation]" 107 S.Ct. 2029, 2033

This Court has analyzed the conflicts between state and federal laws in family law matters through two different approaches.

The first is exemplified by the case of *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802 (1979), in which this Court found an express conflict and therefor an express pre-emption of the state law.

The other approach is an implied pre-emption which this Court found in the case of *McCarty v. McCarty*, supra. That determination was based upon an overall reading of the purpose and scope of the military retirement scheme and the perceived conflict that results from the individual states dealing with that scheme. This Court found that the public policy underlying the enactment of the military retirement scheme overrode the characterization by

state courts of military retired pay as divisible marital property.

In each of the two instances related above, Congress acted swiftly to express its own policy and intent as to the ability of the states to deal with the assets in question in the context of a dissolution of a marriage.

For this Court in this matter to find that there is federal pre-emption of the actions of the California courts, it must find either that the existing federal statutory scheme expressly excludes the present approach by California, or the overall federal statutory scheme expresses a public policy that overrides the state courts' actions. In order to properly analyze this case, it is necessary to understand how California dealt with the benefits in question in the context of a divorce.

II. CALIFORNIA'S CALCULATION OF THE COMMUNITY PROPERTY PORTION OF MILITARY RETIRED PAY IS IN HARMONY WITH FUSFSPA AND NOT IN CONFLICT WITH THE NON-ATTACHMENT PROVISIONS OF 38 U.S.C. 3101.

California is one of eight states that follows the Spanish tradition of characterizing property acquired during the marriage as "community property".

In general, all property derived from the earnings of **either** spouse after the date of marriage, and before the date of separation, is community property. *Hisquierdo v. Hisquierdo*, supra. The general rule applies despite the source of its contribution, or the condition of the title to the property. The interests of the spouses in the assets are present, existing, and equal (California Civil Code (hereafter CC) Section 4800, et seq., and 5105).[2]

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[2] Contrary to Maj. Mansell's position (Appellant's Brief on the Merits, p. 2 ¶ 1) the issue is not directed to a battle between wives on one side and retired military husbands on the other. FUSFSPA is gender neutral as are California's community property laws. While realistically, FUSFSPA benefits

(Continued on following page)

Upon the dissolution of a marriage, each party is entitled to an absolutely equal division of the community property. (CC 4800, et seq.) The right to share in the community estate is a substantive property right and a judgment or agreement which divides such property distributes to the spouses that which, by virtue of the marital relationship, **he or she already owns.** It is separate and distinct from the obligation to make support or alimony payments. A spousal support order reflects the continuing duty of a spouse with greater earning capacity to support the spouse with lesser earning capacity.

Separate property of a spouse is property acquired before the date of marriage, after the date of separation, through an inheritance, or as a personal gift. (CC Sections 5107 and 5108)

Whether property is community or separate is established at the time the asset is acquired. The character of the property may not be altered except by judicial decree or the parties' agreement. (*Casas v. Thompson*, 42 Cal.3d 131, 228 Cal.Rptr. 33 (1986); *Henn v. Henn*, 26 Cal.3d 323, 161 Cal.Rptr. 502 (1980)). Thus, a party can change the character of his or her property from separate to community or community to separate by making an agreement, or by acting in a way that is consistent with such an agreement.[3]

(Continued from previous page)

more women than men, in view of the increased participation of women in the military, increasingly FUSFSPA and community property laws will cut both ways. The law does not differentiate between men and women. This is a **spousal** issue.

[3] For example, the party may inherit a sum of money and invest that sum in an asset that is jointly owned by the parties, as evidenced either by a document of title, or by the methods used to acquire the asset. Such a changing of the character of the property is called transmutation. (CC sec. 5110.710-5110.730, *In re Marriage Lucas*, 27 Cal.3d 808, 166 Cal.Rptr. 853 (1980))

California has characterized "vested" retirement benefits attributable to employment during marriage as community property since 1941. (*French v. French*, 17 Cal.2d 775, 112 P.2d 165 (1941)). Retired pay based on longevity is characterized as community property because it is present pay for past conduct. In a typical dissolution action, retirement benefits are divided along a formula whereby the community estate acquires a percentage interest in the retirement benefits by the same proportion as the length of employment during marriage to the total length of employment.

Disability benefits have been found by California to be the separate property of the person entitled to receive such benefits. (*In re Marriage of Jones*, 13 Cal.3d 457, 119 Cal.Rptr. 108 (1975)). This characterization is based on the theory that disability benefits are to " . . . [c]ompensate the disabled veteran for the loss of earnings resulting from his compelled premature retirement and from diminished ability to compete in the civilian job market." (*In re Marriage of Stenquist*, 21 Cal.3d 779, 148 Cal.Rptr. 9, 14 (1978)).

Generally, persons who have significant disability pensions are not able to qualify for longevity pensions and, likewise, persons with longevity pensions generally are not disabled. It is where a party to a dissolution has a right to receive both, as in the present case, that courts have had to accommodate the competing reasons for the different characterization of property interests.

The California Supreme Court dealt directly with the question that is now before this Court in the case of *In re Marriage of Stenquist*, supra. The California Supreme Court had before it a factual situation almost identical to the instant case. The military spouse had a fully vested right to receive military retired pay based on longevity. The amount of retired pay was based on the years of service in the military, with the military spouse acquiring two and a half percent per year of service interest in the base pay that the person is entitled to receive upon

retirement, up to a maximum of seventy-five percent of such base pay. The military spouse in that matter was also entitled to receive a disability pension, calculated on a percentage of the base pay being received at the time of the finding of disability.

The military spouse in that matter **elected**, as was his right, under 38 U.S.C. 310 et seq., **to receive his disability pension**. By doing so, he had to waive a like percentage of his longevity pay. The military spouse through an act solely under his control and discretion, claimed to have transmuted the community property longevity pension into the separate property disability pension. The trial court, and subsequently the California Supreme Court, agreed that the **disability pension** received by the military person **was indeed his separate property. However, in calculating the longevity pension** to which the non-military spouse was entitled to share, the court must take into account **what the longevity pension would have been had not the military person acted unilaterally to reduce that pension.** As stated by the California Supreme Court (*Stenquist*, supra, 148 Cal.Rptr. 9, 13):

> "We cannot permit the serviceman's election of a 'disability' pension to defeat the community interest in his right to a pension based on longevity. In the first place, such a result would violate the settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse. [Citations] . . . [T]he employee spouse retains the right to determine the nature of the benefits to be received. It would be inconsistent with community property principles 'to permit that spouse to transmute what would otherwise be community property into his or her separate property.' [Citations]" 148 Cal.Rptr. 9, 13

The California Supreme Court approved the method devised by the trial court which calculated the community property interest in the retired pay the military spouse earned during marriage based on longevity without regard to that portion waived in order to be eligible

to receive the disability pension. As with the case now before this Court, enforcement of the resulting judgment was not an issue in *Stenquist*, rather, the issue was **calculation.**

Interestingly, Mr. Stenquist, as has Maj. Mansell, **sought to return to court to modify the judgment issued by the court after the decision in *McCarty v. McCarty*,** supra, and the enactment of FUSFSPA. The effort by the military spouse failed on the grounds of res judicata, but provided the court with the opportunity to reiterate the applicability of the standard announced by the California Supreme Court in the first *Stenquist*, supra, decision.

As stated by the Court of Appeal in the second *Stenquist* case, *In re Marriage of Stenquist*, 145 Cal.App.3rd 430, 193 Cal.Rptr. 587 (1983)

> "The husband seeks to re-examine a long final decision of our Supreme Court. If we assume *McCarty* is controlling (which it is not), it would have a limited application only to those judgments not yet final at the time of the decision, to wit June 26, 1981. [Citations]. Thus, even if arguendo the husband's position is correct, it does not create a right to attack a decision final long before the *McCarty* decision.
>
> Furthermore, the husband seeks to re-litigate whether his disability retirement payments are, in part, properly treated as community property. This is the identical issue presented in *In re Marriage of Stenquist*, supra, before the California Supreme Court. He may not now question this judgment. [Citation] Not only does the doctrine of res judicata apply but also the doctrine of the law of the case precludes re-examination here. [Citation]" 145 Cal.App.3rd 430, 432

The court then restated the law in California, in light of this Court's decision in *McCarty v. McCarty*, and the subsequent enactment of FUSFSPA, as follows:

> "The judgment in *In re Marriage of Stenquist*, supra, awarded a portion of Col. Stenquist's disability retirement pay to his former spouse only because

Stenquist was eligible to receive disability or nondisability retirement pay and he elected upon retirement to receive disability pension of seventy-five percent of his base pay rather than nondisability retirement at sixty-five percent of his base pay. **The trial court treated the ten percent excess of the disability pension as representing additional compensation attributable to Stenquist's disability and classified the balance as retirement benefits acquired during the marriage as community property.** By this disposition, the California rule which prevents a spouse from transmuting community property into separate property by unilateral decision thereby defeating the interest of the other party was vindicated." (Emphasis added) 145 Cal.App.3rd 430, 438

Maj. Mansell here seeks to re-litigate an issue that was long final before the *McCarty* decision and the enactment of FUSFSPA. His efforts have failed in the trial court and the court of appeal, and even though none of the courts involved expressly ruled on the grounds of res judicata, such a point was briefed (Respondent's Brief, p. 5) and is the law in California as indicated above.

III. CONGRESS FIRMLY ESTABLISHED PUBLIC POLICY TO PROTECT FORMER SPOUSES BY ENACTING FUSFSPA, ALLOWING CALIFORNIA TO RETURN TO THE METHOD OF CALCULATING COMMUNITY PROPERTY EMPLOYED BEFORE *McCARTY*. THE LIMITATIONS UNDER FUSFSPA RELATE ONLY TO THE ENFORCEMENT MECHANISM ESTABLISHED BY THE ACT.

California divided gross military retirement pay, including that portion waived in order to receive disability pay in lieu of longevity pay, prior to *McCarty* and it does so today. California did not divide or attach disability pensions prior to *McCarty* and it does not do so today.

If Maj. Mansell's position on FUSFSPA is to prevail, it must be the result of the implied pre-emption standard as

set forth in *McCarty*, as clearly there is no express provision in FUSFSPA preventing California from including that portion of disability pay received in lieu of longevity pay for the purposes of calculating the community property portion of longevity pay that belongs to the former spouse. An analysis of FUSFSPA and its legislative history confirms Gaye Mansell's position.

FUSFSPA was enacted immediately after the holding of this court in *McCarty v. McCarty*. It passed both houses of Congress and was signed into law in September of 1982, fourteen and a half months after this Court issued its decision. By its express terms, the provisions of the law apply to state court decisions rendered before and after June 25, 1981, the day before this Court issued its decision in *McCarty*. The selection of that date was not an accident, but an obvious intent on the part of Congress to carry forth what it stated in its legislative history.

According to Senate Report 97-502, 97th Congress, 2nd Session 16 (1982), the purpose of FUSFSPA is to restore the law to the states as it was before *McCarty*. The states are allowed to divide military retired pay in accordance with their own laws as though ***McCarty* never existed.** As stated in the Senate Report:

> **"The primary purpose of this bill is to remove the effect of** the United States Supreme Court decision in ***McCarty v. McCarty***, 453 U.S. 210 (1981). The bill would accomplish this objective **by permitting** federal, state, and certain other **courts,** consistent with the appropriate laws **to once again consider military retired pay when fixing the property rights** between the parties to a divorce, dissolution, annulment or legal separation. These courts may now apply such laws to the retired pay of federal civil servants, foreign service personnel, and private sector employees." (Emphasis added) (p. 1)

Congress expressly indicated there would be no federal pre-emption over military retired pay. Military personnel would be treated the same as all others going through a divorce.

The Senate Report rejects the contention community property division creates "clear and substantial major damage" to the interests of the Federal Government, and in particular, the Department of Defense.

> "The Department of Defense has **not** submitted **any** satisfactory empirical **evidence** based on reasonable or realistic assumptions concerning divorce proceedings in the State courts **to show during the period prior to McCarty** decision, recruiting, retention and personnel assignment **were adversely affected** by application of State property laws to military retired pay." (p. 8-9)

These stated findings and conclusions by Congress reflect a clear intent to meet the underpinnings of the rationale in *McCarty*, and overturn them.

The analysis that follows from the reading of the statute and the legislative history compels the conclusion there is no express prohibition against state courts **calculating** the longevity retired pay to be divided upon the basis of the **entire** longevity retired pay without regard to any unilateral lessening of the benefit by either spouse.

Maj. Mansell has argued that any entitlement to retired pay by virtue of the passage of FUSFSPA is limited by the definitions contained in FUSFSPA. That analysis fails in light of the clear Congressional intent behind the enactment of the statute, and by the very language of the statute itself.

The argument put forth by Maj. Mansell has been generally referred to as the "gross versus net" argument. Simply put, state courts cannot divide gross retired pay, but only the disposable retired pay as defined by FUSFSPA. The California Supreme Court in the case of *Casas v. Thompson*, 42 Cal.3d 131, 228 Cal.Rptr. 33 (1986) **dealt thoughtfully and forcefully with every single one of the arguments put forth by Maj. Mansell here and rejected each of them.**

Maj. Mansell would have this Court find that there is an express pre-emption based on the so-called "limiting" definitions contained in the Act. In order for that analysis

to follow, the definitional portions of FUSFSPA must be found by this Court to be a statement of the degree to which Congress wanted to allow state courts to exercise independent judgment. Such a conclusion does not follow from a review of the statute and of the committee reports of Congress.

First, the characterization of FUSFSPA as a waiver of sovereign immunity on a limited basis flies in the face of the title of the statute, *"Payment of retired or retainer pay in compliance with court orders."* As indicated by the legislative history, FUSFSPA is a garnishment statute. By its very terms, it allows garnishment of more than the definitional amount under appropriate circumstances. 10 U.S.C. 1408(d)(5) states:

> "If a court order described in paragraph one provides for a division of property (including a division of community property) **in addition to an amount of disposable retired or retainer pay,** the **Secretary concerned shall,** subject to the limitations of this section, **pay to the spouse or former spouse** of the member, **from the disposable retired or retainer pay** of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay."

Even stronger language in the statute gives greater evidence it was written for the purposes of controlling **garnishment**. Sections 1408(e)(5) and (6) state as follows:

> "(5) A court order **which itself** or because of previously served court orders **provides for the payment of an amount of disposable retired** or retainer **pay which exceeds the amount of such pay available for payment** because of the limit set forth in paragraph (1), or for which, because of previously served court orders . . . provides for payment of an amount of disposable retired or retainer pay that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), **shall not be considered to be irregular on its face solely for that**

reason. However, such order **shall be considered** to be fully **satisfied for purposes** *of this section* by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted . . .

(6) **Nothing in this section shall be construed to relieve a member of liability for the payment of** alimony, child support, or **other payments required by a court order on the grounds that payments made out of disposable retired** or retainer **pay** under this section **have been made in the maximum amount permitted . . .** " (Emphasis added)

In the legislative history of those sections the Senate explained that portion of the bill in the following language:

"ENFORCEMENT LIMITATION FOR A PORTION OF RETIRED PAY

The committee agreed that **some portion of** a former military member's retired or retainer **pay** should be **sheltered in terms of the Secretaries' concerned enforcement** of court orders in connection with a divorce . . .

The committee also recognized that **in some instances this 50-percent cap could leave unsatisfied portions of an individual's obligation** for alimony, child support, or **other payments . . .**

Theoretically, this overall cap could leave still unsatisfied portions of alimony, child support or other payments owed a former spouse . . . **[M]oreover, the bill makes it clear that the mere attainment of that ceiling in no way absolves** the former member of **still outstanding legal obligations for** alimony, child support or **other payments. Any such unsatisfied obligation may be enforced by any means available under law** other than those means afforded by this bill or Section 459 of the Social Security Act." (Emphasis added) (p. 11)

The legislative history and the language of the Act clearly indicate the statute is a **garnishment statute designed to limit the ability** of state courts **to enforce**

their orders directly against the benefits received by the military spouse. It does not attempt to tell the state courts what they may or may not do with the underlying property. The fact that there was no such garnishment statute prior to *McCarty* and, as a result of *McCarty*, Congress felt compelled to enact a garnishment statute, is a very strong indication of the Congressional intent to allow military retired pay, in its entirety, to be divided by the state courts in accordance with their own laws.

It was a matter of obvious necessity that Congress included the definition of "disposable" pay. Had Congress not required the deduction of disability benefits in drafting a garnishment statute, it would have placed itself in the ludicrous position of permitting garnishment in violation of its own enactment of the anti-attachment provisions of 38 U.S.C. 3101.

Gaye Mansell concedes she may not receive more than fifty per-cent of the disposable retired pay directly from the military payroll center as payment for her share of the community property interest in the gross military retirement. However, after reaching that fifty per-cent ceiling, she may pursue any other remedy "available under law" to satisfy the remainder of her community property interest.

There can be no implied pre-emption as the Congressional intent is very clearly stated. By enacting a garnishment statute, Congress has gone further than *pre-McCarty* law to express its intent that military spouses are to be treated as all others in divorce cases. No authority has been cited, and none can be cited, where an individual receiving a pension from a private source would be allowed to shield some of that pension through unilateral actions on his or her part. Such a right cannot be found, and, indeed, the opposite intent is found in FUSFSPA.

The whole reason FUSFSPA was enacted was Congress' express intention to re-establish an **important public policy to protect former spouses.** Maj. Mansell's analysis **changes that public policy into a token gesture,**

as will be shown in "EXAMPLE 2" of section IV of this brief.

Further, the Senate Report reveals Congress is well aware of the case law in the various states, including California.

Congress has recently spoken once again on this issue through the report of the House of Representatives' Committee on Armed Services (H.R. 4264, 100th Congress, 2nd Session, Report 100-563) which was issued in April of 1988. That report came as the result of certain states reopening closed cases and dividing pensions which were otherwise disposed of as a result of *McCarty*. In that report, the House states as follows:

> "Some **misunderstanding** may exist **regarding** the **legislative intent** of the Congress **on one aspect** of the Uniformed Services Former Spouses' Protection Act (USFSPA), title X of Public Law 97-252. Some state courts are apparently reopening divorce cases decided before the *McCarty vs. McCarty* decision of June 26, 1981, and are dividing military retirement pay because the original divorce decree was silent on this subject.
>
> **Although the Congress can not preclude state courts from reopening** the pre-McCarty cases, Congress did not intend this to happen. As a result, the Uniformed Services Former Spouses' Protection Act specifically restricted **the direct payment mechanism** to unmodified pre-McCarty decisions . . . " (Emphasis added) (p. 256)

Presumably, if Congress is aware of cases reopening judgments based on *McCarty*, Congress is also aware of "Mansell type" cases. Yet, Congress has not been so disturbed as to correct any alleged erroneous readings of its intent in this area by passing amendments to FUSFSPA or even commenting on it in committee reports. Indeed, while saying this was not its intent, Congress literally stated it had no authority to tell the states what to do.

When a military spouse retires with a longevity pension, that pension is paid after deductions are made for

federal taxes and other required deductions. The amount of federal taxes that are withheld are solely within the control of the military spouse who fills out the form that guides the pay center in making the deduction. This would allow the military spouse, after division by the state court, to continue to manipulate the amount received by the former spouse. Such unequal and disparate treatment is certainly not contemplated by the statute and may itself by subject to constitutional attack under the equal protection clause of the United States Constitution (U.S. Const., XIV Amend., sec. 1).

The April, 1988, H.R. 4264, 100th Congress, 2nd Session, Report 100-563, supra, addressed this very specific issue regarding the military spouse's ability to manipulate what the former spouse receives.

> " . . . Specifically, the committee is concerned that the former spouse may not be totally aware of his or her rights with regard to the tax laws when the retiree has Federal income taxes withheld from military retirement pay.
>
> By way of background, the Comptroller General of the United States issued a ruling on April 25, 1984, that precluded a retired Air Force colonel from withholding Federal income taxes amounting to nearly all of his retired pay . . . [T]he decision went on to say that even if the colonel had such documentation, he is prevented from withholding an amount greater than that determined using the marginal tax rate applicable to retired pay. In other words, he could not satisfy his tax liability on other income by withholding additional taxes from his military retirement pay.
>
> The significance of this decision is twofold. First, it rejects additional withholding without substantiation. Second, **it prevents a service member from shifting his tax burdens associated with outside income onto his military retirement pay thus reducing the amount available to his spouse under the apportionment of retired pay under the Uniformed**

Services Former Spouses' Protection Act." (Emphasis added) (p. 256)

All of these schemes and avenues for one-sided control and disparate treatment lead to the inescapable conclusion this is not what Congress intended to do. As stated by the California Supreme Court in the *Casas* decision, 42 Cal.3d 131, 228 Cal. Rptr. 33 (1986), the correct analysis is "What would this Court do if the *McCarty* case were before it at this time knowing that FUSFSPA has been enacted?", not "What limited waiver of pre-emption resulted from the enactment of FUSFSPA?"

An example comparing the result of the analysis as indicated by Congress and interpreted by the California Supreme Court to the analysis of Maj. Mansell's position is as follows:

Example 1

Assume a thousand dollars gross retired pay a month which has been earned during marriage and subject to division by state courts. Further, assume that ten percent of that is subject to tax. NOTE: MS – Military Spouse, FS – Former Spouse

NET VERSUS GROSS

	Maj. Mansell	(net theory)	California	(gross theory)
	MS	FS	MS	FS
GROSS	1000	–	500	500
TAX	(100)	–	(50)	(50)
NET	450	450	450	450
ADD. TAX	–	(45)	–	–
REFUND	55	–	–	–
FINAL NET	505	405	450	450

As can be seen, just by applying a simple percentage tax bracket, which would be a perfectly legitimate exercise by the military spouse, results in a greatly different disbursement between the spouses of the retired pay earned during marriage. The amount of money received by the former spouse can be controlled by the military spouse merely by determining the amount of deductions taken by the military spouse. As with the VA disability pension, the legislative intent as expressed by Congress in enacting FUSFSPA was to create a shield for the military person. As the legislative history shows, some portion of the retired pay had to be sheltered. By adopting the "net" analysis urged by Maj. Mansell, this Court is turning a shield into a sword.

IV. THE ANTI-ATTACHMENT PROVISIONS OF 38 U.S.C. 3101 ARE SEPARATE AND UNRELATED ISSUES FROM CALIFORNIA'S CALCULATION OF COMMUNITY PROPERTY. *NO CALIFORNIA COURT HAS EVER ATTEMPTED TO GARNISH VA DISABILITY BENEFITS.*

Under 38 U.S.C. 3101, express and implied pre-emptions exist which prohibit state courts from garnishing or dividing VA disability pensions. No California court has ever attempted to do such a thing as suggested by Maj. Mansell. In the present case the only reason the disability pension was divided was due to Maj. Mansell's signed stipulation. **This was a voluntary action by the parties, not an action mandated by the court.** Even so, in the present case, the court never attempted to garnish, or attach, or levy, or seize the disability benefits. Therefore, the pre-emptions under this section are irrelevant arguments to this case or any other California case.

Applying the "express pre-emption" analysis to the VA disability pension requires a determination as to whether there is express statutory language prohibiting California courts from taking the action they did in this case. In this case, and under California law, there is no attempt at "attachment, levy, or seizure by or under any

legal or equitable process whatever, either before or after receipt by the beneficiary." (38 U.S.C. 3101). California courts, as indicated, divide between the owners the community property portion of the longevity pension without taking into account that portion of the pension waived by the military spouse in order to receive the disability pension.

Since California law does not seek to do any of the things prohibited under 38 U.S.C. 3101, there is no express prohibition in federal law, thus no express pre-emption based on that statute.

In order for an implied pre-emption to occur, there must be a finding by this Court that the overall statutory scheme exhibits a public policy that implies pre-emption over any potentially conflicting state law. Again, since California law does not seek to do any of those actions prohibited by Section 3101, there is no conflict, potential or otherwise. The purpose of the disability pension and the anti-attachment provision is to provide a shield for the disabled veteran to ensure the veteran will receive the benefits paid by the United States. That same shielding language cannot now be used, as Maj. Mansell uses it, as a sword to cut-off and then hide property belonging to his former spouse.

Using an example reflects the result being urged by Maj. Mansell and Amici Retired Officers' Association, et al, (hereafter Amici) compared with the result applying California law. That example is as follows:

Example 2

Assume that the gross retired pay earned during marriage by the military spouse is a thousand dollars per month. Further, assume that there is a ten percent tax on the longevity portion of the retirement. Further, assume there is a Veteran's Disability pension under Title 38 in the amount of three hundred dollars per month which is nontaxable.

DISABILITY DEDUCTION

	Maj. Mansell	(Amici theory)	California	(present law)
	MS	FS	MS	FS
GROSS	1000	–	500	500
VA DEDUCT.	(300)	–	(300)	–
TAX	(70)	–	(20)	(50)
NET	310	310	180	450
ADD. TAX	–	(31)	–	–
REFUND	39	–	–	–
VA	300	–	300	–
FINAL NET INCL. VA	649	279	480	450

It is not difficult to imagine the result of a military spouse claiming a fifty or eighty percent disability. **That result would make FUSFSPA completely meaningless in meeting the public policy of protecting former spouses as stated by Congress.**

Obviously, the unilateral actions of the military spouse, waiving a portion of **their** community property interest in the longevity pension, provides the military spouse with a significant increase in the benefits, at the expense of the former spouse. The example contained in the brief filed by the Amici at footnote 13, p. 19, does not take into account the beneficial tax treatment resulting from the VA election, nor the receipt by the military spouse of the VA benefits. The example in the footnote seems to argue the VA benefits are not to be used for anything at all, including the support of the military spouse to whom they are paid.

Maj. Mansell and the Amici rest their entire arguments on the proposition that there is no difference between the ability to characterize and and calculate, and

the ability to enforce. The authority cited by Maj. Mansell, *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49 (1981), as compelling that result and assisting his position indeed shows exactly how this matter should be treated.

In *Ridgway*, this Court held the beneficiary designation authority contained in the statutes establishing the life insurance program for military benefits pre-empted direct enforcement by state courts. However, the opinion in that case states:

> "As the trial court intimated, respondents may have a claim against the insured's estate for that breach; the record does not indicate whether a claim of that kind would be collectible." 102 S.Ct. 49, 57

That is exactly what California law anticipates and is trying to do and exactly what Gaye Mansell is trying to do in this case. The holding in *Ridgway* recognizes the distinction between garnishment and characterization. The state court was not pre-empted from characterizing the benefits in the divorce action, but was prevented from enforcing its orders directly against the United States Government where no garnishment statute exists.

Since the clear reading of *Ridgway* leads to the inescapable results mentioned here, the authority cited by Maj. Mansell and the Amici, necessarily falls. California does not characterize Veteran's disability pension as community property. Nor does California award the Veteran's disability pension to one spouse and award the other spouse offsetting property, which was expressly prohibited by this Court in the *Wissner* decision (*Wissner v. Wissner*, 338 U.S. 55 (1950).

This Court dealt with Section 3101 and the same distinction recently in the case of *Rose v. Rose*, No. 85-1206 (May 18, 1987), 481 U.S. ___, 107 S.Ct. 2029. The order in that case involved incarcerating a person for not making child support payments. The attempted holding of a person in contempt was found by this court not to be a violation of Sec. 3101, as this Court held that Congress intended child support obligations to be considered part

of the Veteran's disability pension and exclusive from the provisions of Sec. 3101. The distinction between a judgment and an enforcement order was explained by Justice Scalia in his concurring opinion as follows:

> "Neither an order basing the amount of a Veteran's child support obligation in part on his disability benefits nor an order that he satisfy that obligation on pain of being held in contempt is an attachment, garnishment, or seizure. Neither directs the disposition of the Veteran's disability benefits or even specifically requires him to use them to satisfy his obligation. [Citation] In other words, child support orders operate on the Veteran's person, not on his property. They therefore are not prohibited by Section 3101(a), and accordingly do not run afoul of the Supremacy Clause." 107 S.Ct. 2029, 2043

Additionally, while *Rose* distinguished support payments from the more mundane aspects of community property, Congress established a public policy that former spouses of military members should be protected by enacting FUSFSPA which overrides that particular distinction. There is no incompatibility between the preservation of that public policy and the anti-attachment provisions of Sec. 3101, providing the former spouse stays within the restrictions as set forth in FUSFSPA when garnishing.

Further, **that case dealt with direct enforcement against the VA disability.** That is not the case before this Court – attachment and seizure of the VA disability benefits has not occurred nor will it occur in the present case.

In this case, the order of the California court neither directs the disposition of the Veteran's disability benefits or specifically requires Maj. Mansell to use those benefits to satisfy his obligation. California law does not allow such an approach in the face of a contest, and, in this case, such an approach is not present as there was a stipulation that an allotment would be taken **from the retired pay** of Maj. Mansell.

V. VA DISABILITY BENEFITS LOSE THEIR EXEMPT STATUS UPON INVESTMENT IN NONEXEMPT ASSETS

It would be helpful for this Court to determine at what point the disability benefits lose their exempt status.

If the military spouse places the disability payments in a bank account which draws interest, is the interest exempt? If the interest is exempt and the military spouse uses the payments and the interest to purchase an expensive car, is the car exempt property? If the car is sold and the proceeds used along with the payments and the interest to invest in a business, are the profits from that business exempt? Where is the line drawn?

The only rational approach is to hold the exemption is lost once the disability benefits are invested in other non-exempt assets. As with the situation whereby separate property loses its status when co-mingled with community property, if the disability benefits are co-mingled in an account with funds derived from other outside income, the benefits should lose their exempt status. The burden of proving the specific funds are exempt would fall on the military spouse.

The result urged by Maj. Mansell and the Amici would render a former military member who receives VA disability benefits virtually judgment proof regardless of the availability of other assets. It could always be claimed that the money used to gain the other assets came from the disability benefits and that all assets are therefor exempt. The former spouse could never trace the assets as being from any other source than what the military member claimed.

Although inconceivable, if a military spouse were somehow retired with a 100% VA disability election instead of retirement *and had no other assets or income,* division of *any* community property interests would be a moot point. Gaye Mansell concedes a former spouse would have no means of enforcing a judgment. Even if a

military spouse signed a stipulation but made no payments, the former spouse is left with no means of enforcing that agreement to the extent of garnishing the disability.

VI. THE WORDING OF MAJ. MANSELL'S "QUESTIONS PRESENTED" AND "JURISDICTIONAL GROUNDS" DOES NOT ACCURATELY REFLECT THE ISSUES BEFORE THIS COURT. WHAT HE SEEKS IS TO DENY GAYE MANSELL ANY LEGITIMATE COMMUNITY PROPERTY RIGHTS SHE HAS IN THE MILITARY RETIREMENT PAY.

It is extremely important to note **Maj. Mansell is not seeking just to limit the community property calculation** of the military retired pay by excluding the disability pension that he is receiving, but, instead, **he is asking this Court to hold that Gaye Mansell has no right to her community property portion of the longevity retirement, or any benefits whatsoever derived from Maj. Mansell's military service during marriage.** That is the relief Maj. Mansell is seeking, regardless of the wording of the "Questions Presented" in the Jurisdictional Statement and Appellant's Brief on the Merits.

Further, Maj. Mansell is incorrect in stating in the "Jurisdictional Grounds" (Appellant's Brief on the Merits, p.2) that " . . . California courts have refused to acknowledge that 38 U.S.C. 3101 prevents states from awarding Veterans Administration Disability Benefits to former wives as community property, . . . " As cited by this brief, California courts have always held VA benefits to be separate property.

Here, the distinction between a separate property right or entitlement of Maj. Mansell and the community property portion of both spouses has been obliterated by the voluntary agreement signed by Maj. Mansell. Under California law either party can transmute separate property into community property by agreement. That is what happened here. By acting so, Maj. Mansell has waived his separate property claims, expressly.

Gaye Mansell is not asking this Court, nor will California law allow Gaye Mansell to ask this Court, to enlarge her right to garnish the retired pay or disability pension of Maj. Mansell. Gaye Mansell is asking this Court to allow her to receive her full share of the military retired pay earned during marriage. She will then seek to collect that through all legal means available, and through no other.

A reversal by this Court will result in a re-opening of every divorce case involving retired military personnel. This Court will be holding it makes no difference there is an agreement, a final judgment, a four year wait and no wrongdoing by a party. No final judgment would be safe.

CONCLUSION

The judgment of the court of appeal should be affirmed.

Respectfully submitted,

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MOTION

Supreme Court, U.S.
FILED
OCT 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-201

In The

Supreme Court of the United States

October Term, 1988

GERALD E. MANSELL,

Appellant,

v.

GAYE M. MANSELL

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIFTH APPELLATE DISTRICT

RESPONSE, AND DOCUMENTS IN SUPPORT OF RESPONSE, TO THE MOTION OF UNITED STATES FOR LEAVE TO FILE AS AMICUS CURIAE

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Appellant,

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ON APPEAL FROM THE COURT OF APPEAL
OF CALIFORNIA
FIFTH APPELLATE DISTRICT

RESPONSE, AND DOCUMENTS IN SUPPORT OF RESPONSE, TO THE MOTION OF UNITED STATES FOR LEAVE TO FILE AS AMICUS CURIAE

Gaye M. Mansell, Appellee herein, objects to the motion filed by the Solicitor General, on behalf of the Government, and respectfully requests this Court deny the motion.

The position of the Government in this matter is a direct result of a lack of due diligence on the part of the Government. Appellee has had no part in the decision making process of the Government, and has not in any way impeded the Government in their actions. The Appellee is now the one being directly punished as the

result of the lack of due diligence by the Government. The lackadaisical approach taken by the Government in this action should not be condoned by allowing them to file their brief more than forty-five days after the date it was due, and also after the briefs in response have been filed by the Appellee and the Amicus Curiae for the Appellee.

The Government was asked to file a brief as amicus curiae in this matter on December 7, 1987, and did file such a brief on June 7, 1988. This Court noted probable jurisdiction in this matter on June 27, 1988, making Appellant's brief due August 11, 1988. An extension was granted Appellant to file his brief until August 25, 1988.

On September 6, 1988, two weeks after the deadline for filing all briefs on behalf of the Appellant, the Government indicated they were intending to file an additional brief in support of the position of the Appellee and requested the Appellee seek an extension of time to assist in the filing of that brief by the Government. On September 7, 1988, the Government filed its motion with this Court for divided argument. On September 9, 1988, the Appellee requested the time for the filing of the brief on the merits be extended to October 8, 1988, which was granted by this Court on September 14, 1988.

On September 26, 1988, the Government indicated to this Court they wanted to defer action on the motion for divided argument pending further consideration. A copy of that request was received by Appellee on September 30, 1988.

On September 28, 1988, Appellee contacted the Government, after having received no contact from the Government for several weeks, and was informed the Government was reviewing its position and might change its position. Further contact from Mr. Thomas Merrill, Deputy Solicitor General, indicated an additional extension of time within which to file the briefs would receive favorable treatment by the Clerk of the Court, making the expensive and time consuming filing of a supplemental brief unnecessary.

As indicated in the supporting documents, the brief for Appellee had to be off to the printers by the 30th of September in order to have sufficient time to make all corrections necessary before the final brief was filed by October 8th.

After discussing the matter with the Assistant Clerk of this Court, it was determined the only grounds for seeking an additional extension would be the brief reportedly being filed by the Government, and that no other grounds existed, nor would any other grounds be fabricated.

Indications from the Assistant Clerk were that the filing of the brief by the Government in which they changed their position may or may not be relied upon as sufficient grounds for an extension. Based on such information, the Appellee filed her brief on the merits on October 6, 1988.

On October 4, 1988, the Government indicated their motion for divided argument should be withdrawn from the Court's calendar, and such communication was received by Appellee on October 6, 1988. The motion to

which this response is being filed was received on October 11, 1988.

Based upon the foregoing series of events, it can be seen the Appellee has been greatly prejudiced. The Government had more than ample time to review the situation, and review the appropriate position it wished to take in this matter. *The Government's decision to change position was not communicated until after Appellee contacted the Government*. One can only wonder when, if ever, the Government intended to inform Appellee.

The decision was made so late in the briefing process, Appellee had no choice but to file her brief on the merits. By thus filing, the Appellee is now faced with the prospect of seeking the permission of this Court to file a supplemental brief in response to any points raised by the Government. Further, the Amicus Curiae that filed in support of the position of the Appellee is now prevented from commenting on the brief of the Government even though the rules of this Court anticipate allowing such amicus curiae to so comment. It is questionable if the limited funds of the Amici would permit filing such a brief.

The Solicitor General states in his motion the Government will present new materials not cited by any other party. This rationale is, under the circumstances, dubious at best. Between all the cases, reports, hearing transcripts, law review articles, and the like, a small library could be cited were it not for page limitations. There is no doubt Appellee could write a supplemental brief citing materials not cited by any other party to date, including the Government.

Appellee has now been placed in the position of expending more time, and expense, in responding to the position of the Government when such position, had the Government acted with due diligence, should have been known within the time limits allowed to the Appellant in this matter.

CONCLUSION

For the foregoing reasons, and the further reasons set forth in the Declaration of Dennis A. Cornell, and the Declaration of Cathryn A. Lamb, the motion of the United States to file as amicus curiae should be denied by this Court.

Respectfully submitted,

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APPENDIX

Declaration of Dennis A. Cornell, Counsel for Appellee

I, Dennis A. Cornell, declare:

1. I am the attorney for the Appellee, Gaye M. Mansell.

2. On December 7, 1987, this Court requested the Government file a brief as amicus curiae in this matter.

3. On June 7, 1987, the Government filed its brief with this Court indicating the position of the Appellee should prevail, but that probable jurisdiction should be noted to resolve the question once and for all.

4. On June 27, 1987, this Court noted probable jurisdiction.

5. On August 25, 1988, the time within which the Appellant's brief on the merits should be filed, and all briefs of amicus curiae in support should be filed, expired.

6. On September 6, 1988, Christine Desan Husson, Assistant to the Solicitor General, contacted your declarant, and indicated the Government wished to file an additional brief on the merits in support of the position of the Appellee, and further requested Appellee seek an extension of time so the Government could file such a brief.

7. On September 7, 1988, the Government filed its motion with this Court for divided argument which motion reflected the agreement of Appellee to assign a portion of time for her argument to the Government.

8. On September 9, 1988, Appellee sought an extension of time due to calendaring conflicts resulting from the original extension having been granted to Appellant.

9. On September 14, 1988, this Court granted an extension until October 8, for Appellee to file her brief on the merits.

10. On September 28, 1988, *your declarant contacted Ms. Desan Husson by phone to determine the progress of the brief as your declarant had not had any contact with the Government since the conversation of September 6th.* At that time, Ms. Desan Husson indicated the Government was more than likely going to change their position on the matter and was going to support the position of the Appellant. Ms. Desan Husson further indicated the Government would assist with the Clerk's Office to obtain another extension of time so Appellee's brief on the merits could address the brief being filed by the Government.

11. Your declarant informed Ms. Desan Husson in the conversation of September 28, 1988, the time requirements of the printer required the brief on the merits of the Appellee be sent to the printer on September 29, 1988 in order for the brief to be filed within the time required by this Court. Ms. Desan Husson indicated her superior would be in contact with the Court and would make it easier for Appellee to obtain an extension so the time requirements would not be so severe.

12. Later in the day on September 28, 1988, Tom Merrill, Deputy Solicitor General, contacted your declarant and indicated he had discussed the matter with the Clerk's Office of the Supreme Court and had received an

indication Appellee could obtain an extension as a result in the change of position being taken by the Government. Mr. Merrill further indicated a final decision by the Government as to whether or not the Government was going to change its position had not yet been made, but that your declarant would be informed as soon as such a decision was made.

13. An additional discussion was had with Mr. Merrill on September 29, 1988, in which Mr. Merrill indicated your declarant should contact Sandy Nelson, the Assistant Clerk of this Court, to determine whether or not an extension could be obtained in order to respond to the change in position which most probably would be taken by the Government. Mr. Merrill further asked if your declarant could wait until later in the following week to send the brief to the printer if an extension were not granted.

14. As it was too late in the day on the 29th to contact this Court, and as your declarant was in trial in another county on September 30th, Cathryn A. Lamb, legal assistant to your declarant, contacted Ms. Nelson at the Court on September 30, 1988. The result of that conversation is contained in her declaration which is included with this response.

15. Apparently, on September 26, 1988, two days prior to your declarant's initiating contact with the Government, the Government filed a request with this Court that its motion for divided argument be deferred pending further consideration. A copy of that request was received by Appellee on September 30, 1988.

16. After the discussions with Ms. Desan Husson and Mr. Merrill, and wanting to discuss the situation with Ms. Nelson, contact was made with the printer to determine the latest possible time the brief could be submitted without incurring significant overtime costs. Based on the representations of the printer, a delay of four days, from September 29th to October 3rd, was scheduled.

17. On September 30, 1988, based on the conversation of Cathryn A. Lamb with Ms. Nelson, and based on the extremely tight printing schedule previously established with the printer, it was decided the brief on the merits of the Appellee should be filed as scheduled and it was sent to the printer on the morning of October 3, 1988.

18. On October 6, 1988, the brief was filed with this Court by Appellee. Also on that date, Mr. Merrill contacted your declarant and indicated the Government had decided to take a new position in the matter and was seeking the permission of this Court to file a brief in support of the Appellant, and that a copy of such motion should have been received by Appellee.

19. On October 7, 1988, a rough draft was received by Appellee, and the actual motion itself was received on October 11, 1988.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Merced, California on October 12, 1988.

Dennis A. Cornell,
Attorney for Appellee

Declaration of Cathryn A. Lamb, Legal Assistant to Dennis A. Cornell, Attorney for Appellee

I, Cathryn A. Lamb, declare:

1. I am employed as a legal assistant to Dennis A. Cornell, Attorney for Appellee.

2. On The afternoon of September 29, 1988, Mr. Cornell informed me he would be in trial, out of town, the next day and requested I contact Sandy Nelson at the Clerk's Office of the U.S. Supreme Court regarding a possible extension of time in which to file the Appellee's brief on the merits.

3. On the morning of September 30, 1988, I telephoned Ms. Nelson, and stated to her the Solicitor General's office indicated we could get an extension due to the change in their position. I did not receive an assurance from Ms. Nelson that an extension would be granted for that reason, but rather Mr. Cornell would have to send a written request. We discussed the time it would take to file such a request, and I was informed by Ms. Nelson that a decision would be made after receipt of the request and, appropriately, no guarantee or assurance could be granted over the phone.

4. I informed Mr. Cornell of the conversation in the early evening of September 30, 1988, when he telephoned his office.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Merced, California on October 12, 1988.

Cathryn A. Lamb,
Legal Assistant to
Dennis A. Cornell

SUPPLEMENTAL BRIEF

Supreme Court, U.S.
FILED
NOV 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-201

In The

Supreme Court of the United States

October Term, 1988

GERALD E. MANSELL,

Appellant,

v.

GAYE M. MANSELL,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
OF CALIFORNIA
FIFTH APPELLATE DISTRICT

SUPPLEMENTAL BRIEF OF APPELLEE IN REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Gaye Mansell will address the following questions presented by the brief for the United States as Amicus Curiae:

1. Whether the Federal Uniformed Services Former Spouses Protection Act, 10 U.S.C. (and Supplement IV) 1408, requires that Appellant's VA benefits be excluded in calculating Appellee's community property interest in Appellant's Air Force retirement pay.

2. Whether the holding in *McCarty v. McCarty* is to be applied retroactively to all cases dealing with the division of military retirement benefits upon divorce.

3. Whether the Federal Uniformed Services Former Spouses Protection Act is to be given full retroactive application to judgments that were final prior to the effective date of the act.

4. Whether the doctrine of res judicata prevents the application of the full retroactive effect of the Federal Uniformed Services Former Spouses Protection Act and the decision of *McCarty v. McCarty*.

5. Whether the authority of the individual states to govern the making and enforcement of written agreements is pre-empted by the Federal Uniformed Services Former Spouses Protection Act.

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SUMMARY OF ARGUMENT

The Government is asking this Court to apply a statute which was enacted four years after the date of the entry of the Judgment in the case now before the Court to modify that Judgment. Such an analysis requires this Court to ignore the long held doctrines of res judicata and finality.

The position of the Government in this matter extends the scope of the case beyond the question originally presented to this court and upon which this court noted probable jurisdiction.

The relief requested by the Government goes far beyond the issue of the exemption of Major Mansell's disability benefits from garnishment to include a complete deprivation of Gaye Mansell's right to receive any portion of the retired pay.

The reading of the Federal Uniformed Services Former Spouses Protection Act urged by the Government relies upon a holding of no retroactive application, even though the facts of this case would require just the opposite.

The application of the provisions of the Federal Uniformed Services Former Spouses Protection Act to Judgments that were final before the effective date of the act, and before the holding of this court in *McCarty v. McCarty*, indicates that the appropriate interpretation of the statute is that of a garnishment statute and not of a limited waiver of pre-emption. In order for this court to find that there is a limited waiver of pre-emption by Congress, it first must find that there was pre-emption

originally and that the Congress decided to waive a portion of that. Such a reading is not consistent with the intent as reflected by the reports of Congress and the reading of the statute itself. The provisions of the statute limiting the availability of retired pay for garnishment applies not only to property divisions but to child and spousal support as well.

The standard to be applied by this court when determining whether or not there is pre-emption requires that the benefit of the doubt be given to the states controlling their own destiny. The brief of the Government admits that such an interpretation is reasonable and available from the wording of the act and the supporting documents. That being the case, the alternative that points towards the states being in control of their own destiny must be the one that is adopted by this Court under the appropriate standard of review.

A holding on these issues by this Court is inappropriate in any event as the jurisdiction of this Court should never have been invoked. The trial court and the Court of Appeal in this matter had available to it adequate and independent state grounds upon which a decision could have been reached. That ground is res judicata as this issue was fully litigated, agreed to and adjudged four years prior to Major Mansell seeking any relief. Even should this Court rule in favor of Major Mansell, Gaye Mansell could return to the state courts and have another determination made solely on state grounds, which would make this entire exercise fruitless.

ARGUMENT

I. THE ANALYSIS OF THE GOVERNMENT REQUIRES THIS COURT TO IGNORE THE DOCTRINE OF RES JUDICATA, APPLY THE PROVISIONS OF FUSFSPA TO ALL JUDGMENTS, ENTERED BEFORE OR AFTER THE ENACTMENT OF FUSFSPA, AND SUBJECT ALL CONTRACTS AND JUDGMENTS TO MODIFICATION BY SUBSEQUENT COURT DECISIONS AND STATUTORY ENACTMENTS.

Each brief filed on behalf of the Maj. Mansell, and each brief filed by the Government, has stated a different and more expansive "Question Presented". The original question as presented in the Jurisdictional Statement of Maj. Mansell, was limited to the effect of 38 U.S.C. Sec. 3101(a) on the ability of the states to dispose of Veteran's Disability Benefits in divorce cases.

Now, the Government, in its second brief (hereinafter Brief II), has broadened the questions even further to the point where it is asking this Court to apply a law enacted February 1, 1983, to a judgment that was effective in May of 1979. The law in question was not mentioned in the Jurisdictional Statement upon which this Court noted probable jurisdiction. Indeed, the Government maintained its original position, in Brief II, that Maj. Mansell was incorrect in his appeal, based on the question presented in the Jurisdictional Statement.

For the position, as put forth by the Government in Brief II, to be upheld, the following conclusions must be reached by the Court:

1. The decision of *McCarty v. McCarty*, 453 US 210, 69 LEd2d 589 [1981], must be considered to be applied retroactively to all cases in existence dealing with the division of military benefits upon divorce.

2. Judgments that were final prior to the effective date of FUSFSPA would be subject to the full retroactive application of FUSFSPA.

3. The doctrine of res judicata does not apply to any final judgments dividing military retirement benefits before the effective date of FUSFSPA or *McCarty*.

4. The authority of the states to govern the enforcement and modification of written agreements executed before the effective date of FUSFSPA must fall in the face of FUSFSPA.

In footnote 16 on page 24 of Brief II, the Government indicates FUSFSPA is to be applied prospectively only except for the garnishment provisions of the statute. However, the Government asks this Court to apply the provisions of FUSFSPA retroactively to a judgment which was final four years prior to the enactment of FUSFSPA.

There is no authority, state or federal, indicating the decision of this Court in *McCarty* was fully retroactive to all decisions final prior to the date of the *McCarty* decision. In California both the courts of appeal and the Supreme Court have spoken directly on the issue. (*In re Marriage of Frederick*, 141 CA3d 876, 190 CR 588 [1983], *Aloy v. Mash*, 38 C3d 413, 212 CR 162, 696 P2d 656 [1985]). No state authority, in California or elsewhere, has indicated otherwise. No enactment by Congress, and no federal case has held otherwise.

There is no case law or statutory enactment which utilizes FUSFSPA to modify or limit the effect of judgments entered prior to the effective date of FUSFSPA. The doctrine of res judicata prevented those persons affected by *McCarty* from getting relief after FUSFSPA. As a result, the California legislature, after the enactment of FUSFSPA, felt compelled to provide an opportunity to those spouses who had their cases decided between the effective dates of *McCarty* and FUSFSPA to have another opportunity to litigate the matter. The legislature enacted California Civil Code (CC) Sec. 5124 as a limited abrogation of the doctrine of res judicata in order to effectively carry out important policy considerations. CC Sec. 5124 was upheld by the California Supreme Court against constitutional attack in the case of *In re Marriage of Barnes*, 43 C3d 1371, 240 CR 855 (1987). In *Barnes*, the California Supreme Court was very careful to point out the doctrine of res judicata applies unless there are specific reasons not to. Those reasons must be articulated and must have the weight of overwhelming public policy that overrides the judicial doctrine of finality.

In this case, Maj. Mansell is seeking relief that is expressly prohibited by California authority. (*In re Marriage of Stenquist*, 145 CA3d 430, 193 CR 587 [1983] (Stenquist II)). In Stenquist, the appellant sought to modify a contested judgment that dealt with the exact same benefits which are before the Court in this case. There, the court said the finality of the prior judgment withstood the decision of this Court in *McCarty*. Based on the doctrine of res judicata, the appellant there could not seek a review of the prior judgment. The facts in that case are even stronger than the case now before this Court as the

judgment was contested, both at the trial level, the court of appeal, the California Supreme Court, and this Court. In this case, the judgment was stipulated. The judgment was based on a written agreement. There was no appeal.

The Government does not discuss in Brief II the practical effects of the conclusion it is insisting the Court reach. Such a conclusion necessarily means all judgments which were final and not appealed, or appealed to a final conclusion, would be subject to being reopened based on the interpretation of FUSFSPA as put forth by the Government. There is no other conclusion that can be reached as the judgment and agreement before this Court was four years old at the time Maj. Mansell sought the modification.

The relief requested by the Government in Brief II would not merely prevent the trial court from dividing the disability pension. The paragraph which is sought to be stricken from the judgment by Maj. Mansell, and the Government, is the enabling portion of the judgment that divides all retirement benefits, both disability and otherwise, gross and disposable. It is identical to the paragraph contained in the written agreement which is also incorporated into the judgment. By striking the paragraphs as mentioned by Maj. Mansell, Gaye Mansell would be left with no rights to any benefits, disability or otherwise, and no ability to return to court to seek other relief.

Maj. Mansell, and now the Government, continues to request this Court make a definitive ruling on the divisibility of Veterans' Disability Benefits in a divorce. However, neither of them seems to understand that in order for this Court to make such a ruling on the facts before this Court in this case, this Court must necessarily do away with judicial and statutory doctrines that have been in place for centuries. Neither Maj. Mansell nor the Government has even remotely addressed the impact of such a decision. No final judgment in any type of case would be immune from direct attack citing this case as authority for the proposition that written agreements and stipulated judgments, whenever enacted, may be attacked at a subsequent time if there is a change in the law. There would be no finality. The financial ramifications would be enormous. The effects on the judgments of the various state and federal courts would be incomprehensible. Based on this one narrow issue, hundreds of decisions in California, if not thousands, finalized since the division of vested benefits began in 1941 (*French v. French*, 17 C2d 775, 112 P.2d 165 [1941]), would be subject to attack. Also, since this Court would of necessity be applying subsequent decisions and statutes to a final judgment, then all final judgments on other issues must necessarily be vulnerable to subsequent decisions and statutes.

Maj. Mansell and the Government seek to broaden the questions presented before this Court in order to achieve a sweeping result, however, they fail to address what are obviously the most sweeping ramifications of their approach.

II. FUSFSPA CONTAINS NO DIRECT POSITIVE ENACTMENT INDICATING PRE-EMPTION OF STATES' RIGHTS, AND, A LOGICAL READING OF FUFSFPA INDICATES THAT IT IS A GARNISHMENT STATUTE DESIGNED TO ENLARGE THE RIGHTS OF THE STATES TO ENFORCE ITS ORDERS.

Assuming, without agreeing, the issue presented by the Government's Brief II is properly before this Court, that position does not apply the appropriate standard of review or reflect the clear meaning as derived from the practical application of FUSFSPA.

When analyzing the application of a state court order or judgment in a domestic relations action involving a federal right or entitlement, the analyzer has two standards of review. Simply put, they are:

Whether the states can act unless the United States Government says "No", or the states cannot act unless the United States Government says "Yes."

The appropriate standard as recited by this Court in *Hisquierdo v. Hisquierdo*, 439 US 572, 59 LEd2d 1 [1979] and *McCarty v. McCarty*, 453 US 210, 69 LEd2d 589 [1981] is that the states can make court orders or judgments affecting federal rights or entitlements unless the federal government says "No". Unless there is express pre-emption, or very clearly implied preemption, the states can do as they please.

During several parts of Brief II, the standard of review applied by this Court to the domestic relations

actions of the state courts is recited. Once enunciated, the Government fails to follow that standard in its own analysis.

The analysis of the Government in its Brief II seems to indicate FUSFSPA reflects a limited waiver of pre-emption. The Government looks to testimony before the Congress to support its position, but can find no support for its position in the language of the statute itself, or in the intent of Congress as indicated by the Senate Report 97-502, 97th Congress, 2nd Session, [1982] and the House Conference Report 97-749, 97th Congress, 2d Session [1982]. The Government cites no other areas of law where there is such a limited waiver of pre-emption. There is no language in the statute, the reports, or the testimony indicating Congress intended to waive pre-emption on a limited basis.

When the standards of review which must be applied as required by *Hisquierdo* and *McCarty*, are put to FUSFSPA, this Court must find an implied waiver of pre-emption indicating a very strong "No" to the state courts, before it can prevent state courts from applying their own laws.

The position of the Government relies on the conclusion the decision of this Court in *McCarty* was declaratory of the law and therefore there was complete pre-emption until Congress let go of the pre-emption a little at a time. The structure of FUSFSPA itself seems to indicate that approach is incorrect.

As indicated in the *McCarty* decision, that decision was expository of the opinion of the majority of the members of the Court at that time as to what they

thought the law was. That Court clearly indicated that it was up to Congress to determine the appropriate application of state court laws to federal entitlements, and that Congress' authority was supreme. Congress then enacted FUSFSPA, almost immediately, and allowed its provisions to be applied to judgments which were final the *day before* the decision in *McCarty*. That is a clear indication of the Congress carrying out what they intended to do, that is, to eliminate the vestiges of *McCarty* as though it never occurred. California courts have interpreted the actions of Congress in exactly that way. (*In re Marriage of Frederick*, 141 CA3d 876, 190 CR 588 [1983]). Without the *McCarty* rationale, there has never been any pre-emption. The law of the various states is as it was prior to the rendering of *McCarty*.

That being said, FUSFSPA then becomes an attempt to embellish the rights of the state courts to deal with the federal benefits. The first evidence of that is the title of the act itself, "Payment of Retired or Retainer Pay in Compliance with Court Orders". FUSFSPA then sets out in an elaborate fashion, as explained by the Senate and House reports, to limit the ability of the states to *garnish*.

Such limitations are not confined to property rights as defined by the state courts, but to child and spousal support as well (10 U.S.C. 1408 (a)(2)(B), (d)(1), (e)(4)(B), (e)(5)). No where does the Government indicate that its reading of FUSFSPA would limit the states to the awarding of child and spousal support to the amounts allowed under the provisions of FUSFSPA. Clearly, the states can award spousal support and child support in an amount the states feel is appropriate, but then can only enforce

that order against the federal benefits directly within the provisions of FUSFSPA.

As the division of the military retirement pay and child and spousal support are dealt with directly in FUSFSPA in the same sentence, the "garnishment statute only" analysis which applies to the spousal and child support provisions must also apply to the property provisions.

Also, if Congress intended to dole out limited waivers of pre-emption as the Government indicates, then why would Congress include a clause that allows a direct garnishment for "other payments" (10 U.S.C. 1408 (e)(6))? Clearly, Congress was granting unto the states the broadest authority to fashion orders that are consistent with the laws of the individual states, and then limit the ability to enforce those orders directly against the pay received by the former federal employee.

The dates included in the statue itself indicate the purpose and effect of the statute. As indicated above, Congress wanted this statute to have an overall impact on state judgments dividing military retirement benefits. It was accomplished by directly applying the terms of the Act to judgments which were final the day before this Court's decision in *McCarty*. If Congress intended the limited pre-emption as stated in Brief II, then it necessarily follows that limited pre-emption must have full retroactive effect to all judgments final before *McCarty*. No where in any of the supporting materials cited by the Government, or any other party to this action, is there any indication that Congress intended to limit and change the orders that were already in effect on the date

of the *McCarty* decision. The only rationale for such a date is the availability of this statute to judgments that were final before *McCarty*.

As Congress was indicating through the various portions of the statute that the interpretation of Congress' intent by this Court in *McCarty* was clearly wrong, then FUSFSPA is entirely consistent with Congress' attempt to broaden the rights of the states and not restrict them. Applying the Government's own standards, as stated by this Court in *Hisquierdo*, that preemption must be "positively required" by direct enactment, (*Hisquierdo v. Hisquierdo*, 439 US 572, 581 [1979]), such positive direct enactment is not found in the statute. No where are there words to the effect that states may not treat any thing other than the defined benefits as divisible property upon divorce.

Indeed, the Government indicates that there are two reasonable interpretations to be given to FUSFSPA, one of which supports the position of Maj. Mansell, and one of which supports the position of Gaye Mansell. There cannot be a position supporting Gaye Mansell if in fact the standards of positive direct enactment have occurred. Without that occurring, there can be no reasonable position in support of Maj. Mansell. Applying the standard as set forth by this Court, and as acknowledged by the Government in Brief II, this Court must find the interpretation as asserted by Gaye Mansell is the correct one. A clear reading of the statute and the practical effects of the dates and language of the statute, and the supporting reports of the Senate and House, lead to no other conclusion.

III. THE DECISION OF THE TRIAL COURT AND THE COURT OF APPEAL IN THIS CASE CAN BE MADE ON INDEPENDENT AND ADEQUATE STATE GROUNDS THEREBY DIVESTING THIS COURT OF JURISDICTION.

The broadening of the question presented and issues to be determined in this case by Brief II, and the resulting impractical effects of granting the relief that is requested in that brief, demonstrates the lack of jurisdiction this Court has over this matter.

Rule 16.1(b) of this Court requires that, before this Court can assume jurisdiction of a state Court decision, the state court decision must not rest on independent, inadequate state grounds. If the state court decision was rendered on state grounds and federal grounds, either one of which would have been adequate to determine the case, then this Court has no jurisdiction to review the decision. (*Fox Film Corp. v. Muller*, 296 US 207, 210, 80 LEd 158 [1935]).

Where the state court enters no written opinion, as was the case in the trial court in this matter, and the state grounds that were raised in the supporting documents and arguments before the trial court were sufficient to support the judgment, then this Court presumes the judgment was based on state grounds and will not assume jurisdiction over the case. (*Lynch v. New York ex rel. Pierson*, 293 US 52, 54-55, 79 LEd 191 [1934]).

If the opinion of the court below rests on an interpretation of a federal statute thereby conferring jurisdiction on the Court, but the court at the state level could have decided the case on independent state grounds,

then this Court should decline jurisdiction. (*Paschall v. Christie-Stewart, Inc.* 414 US 100, 38 LEd2d 298 [1973]).

In the *Paschall* case, the state court opinion did not reflect the independent state grounds of a statute of limitations. However, after briefing and oral argument, this Court realized the state court's decision might have rested on independent state grounds had it been considered. This Court referred the matter back to the state court for determination of the applicability of the state statute of limitations to the facts of the case. Thereafter, the state court held the statute of limitations was determinative of the case exclusive of any federal grounds, and the matter was concluded.

In this case, the trial court issued no written opinion on the matter other than a denial of the motion. Counsel argued and briefed the issue of res judicata, along with the applicable federal standards which have been put forth before this Court. Both theories were argued and briefed before the California Court of Appeals, and that court rendered its opinion without discussing the res judicata issue. That the court could have decided the issue on res judicata is clear. (*In re Marriage of Stenquist*, 145 CA 3d 430, 193 CR 587 [1983] (Stenquist II)). The fact it did not, but instead ruled in favor of Gaye Mansell on other grounds, does not mean it would not have ruled in favor of Gaye Mansell on the independent state grounds had it thought it necessary to do so.

As this Court is restricted to the review of the federal questions presented, and not the state questions, and a remand to the state courts to act consistent with the opinion of this Court would be the judgment of this

Court should Maj. Mansell prevail, the state courts would still be free to decide once again on the independent state grounds, thus making the entire exercise fruitless and the decision of this Court dictum. Such a waste of judicial resources is the reason for Rule 16.1(b). As can plainly be seen from the facts of this case, Maj. Mansell is seeking to re-litigate a matter that was litigated four years earlier and resulted in a final judgment based on his agreement. The Government is apparently seeking to do the same thing by the relief it is recommending in Brief II. That brief goes one step further and asks this Court make FUSFSPA fully retroactive and applicable to all judgments in effect on the effective date of the legislation, thus flying in the face of the individual states' rules of res judicata and retroactivity.

CONCLUSION

The decision of the Court of Appeal should be affirmed.

Dated: November 15, 1988

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BRIEF

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No.87-201

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

GERALD E. MANSELL, Appellant

v.

GAYE M. (MANSELL) FORBES, Appellee

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

Appellant's Reply Brief

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QUESTION PRESENTED

Whether California may characterize Veterans Administration Disability Benefits as property and divide the benefits as community property upon dissolution of marriage despite the anti-attachment protections of 38 U.S.C. §3101.

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ON APPEAL FROM THE COURT OF APPEAL
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Appellant's Reply Brief

INTRODUCTION

Mrs. Forbes recognizes that California may not divide V.A. disability compensation as community property. She gives lip service to the implied pre-emption test of *McCarty v. McCarty*, 453 U.S. 210 (1981) and the direct prohibition test of *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). However, she fails to analyze the present case under either test. She overlooks the fact that pre-emption also prevents offsets, constructive trusts, and every other device and contrivance that frustrates the national scheme by taking the mandated compensation of disabled veterans.

She claims that Congress intended to relinquish all control over division of military retirement pay upon dissolution of marriage, but her citations are to abandoned ideas. Congress recognizes that the United States Constitution commits exclusively to Congress the power "[t]o raise and **support** Armies," and to "make Rules for the Government and Regulation of the land and naval Forces." (U.S. Const., Art. 1, sec. 8, cls. 12-14)[1].

Congress also recognizes that it may not delegate unbridled authority to the fifty individual states[2] to tamper with the support of the military services. Nevertheless, Mrs. Forbes argues that the federal government relinquishes control over the pay of retired military members as soon as they dissolve their marriages. This conclusion is ludicrous and is very possibly unconstitutional (*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920))[3].

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1. "The execution of these powers falls within the line of [Congress'] duties; and its control over the subject is **plenary and exclusive**. (*United States v. Tarble*, 13 Wall 397, 408, 12 L.Ed. 597 (1872))

2. "* * * the government-soldier relation [is] **distinctively and exclusively** a creation of federal law * * *" (*United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947)). Congress may not delegate power reserved exclusively to Congress by the Constitution (*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920)).

3. Mrs. Forbes evades the fact that military retirement pay is reduced pay for reduced current service (*United States v. Tyler*, 105 U.S. 244 (1882); Appellant's opening brief, §IV, p. 36-41).

She evades the fact that redirecting retirement pay, as vested property due for services already performed, from the retired member to whom it belonged in its entirety (*McCarty v. McCarty*, 453 U.S. 210 (1981)), represents an unconstitutional taking of a settled interest (*United States v. Larionoff*, 431 U.S. 864, 879 (1977); Appellant's opening brief, §V, p. 41-46).

Finally, Mrs. Forbes asserts a number of reasons why this Court should not and/or may not reach the issues of this appeal. However, none of her arguments have any merit.

I
CALIFORNIA'S ORDER CONSTITUTES A FORBIDDEN SEIZURE

Mrs. Forbes concedes that 38 U.S.C. §3101 prevents state courts from dividing V.A. disability compensation as community property (Appellee's Response Brief [R.B.] p. 1 and 21). However, she declares, without any analysis or citation to authority, that in the lower courts "* * * there were no garnishments attempted, issued, sought or granted against the disability pay * * * " (R.B. p.3). She completely ignores the question of forbidden offsets (*Wissner v. Wissner*, 338 U.S. 55 (1950)). She also evades the problem of prohibited constructive trusts and seizures (*Ridgway v. Ridgway*, 454 U.S. 46 (1981)).

The net effect of the judgment in the present case is that California has ordered an offset from Major Mansell's

remaining longevity retirement pay to compensate for the lack of power to divide the V.A. disability compensation. However, California may not make an offsetting award from other assets (*Wissner v. Wissner*, 338 U.S. 655, 659 (1951)). To do so anticipates the benefit in violation of the 38 U.S.C. §3101, just as would awarding a house or other property as an offset (*Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588-589 (1979)), and as imposition of a constructive trust would operate as a forbidden "seizure." (*Ridgway v. Ridgway*, 454 U.S. 46, 60 (1981)).

California's attempt to avoid the anti-attachment provisions violates the unqualified sweep of the statute. Section 3101 prohibits, in the broadest of terms, any "*attachment, levy, or seizure by or under any legal or equitable process whatever*," even after receipt by the disabled veteran (*Ridgway, supra*, 454 U.S. at 60).

In *McCune v. Essig*, 199 U.S. 382 (1905), state community property law and the doctrine of relation could not overcome federal law. This Court noted that the claimant's arguments were just another way of imposing state limitations upon federally created rights. The Court held that, **since federal law placed the property in the hands of another, state law could not interfere** (*Id.*, 199 U.S. at 390). The same is true in the present case, but Mrs. Forbes fails to address the issue.

In *Free v. Bland*, 369 U.S. 663 (1962), a state court awarded bonds to the federally designated beneficiary, but also ordered reimbursement of one half of the value under the state community property law. This Court said, "*Viewed*

realistically, the state has rendered the award of title meaningless." (Id., 369 U.S. at 669). Therefore, **the offset could not stand** (*Ibid.*). In the present case, award of one half of Major Mansell's disability compensation to his ex-wife as her separate property is logically indistinguishable from *Free v. Bland*. Therefore, the offset cannot stand. But, once again, Mrs. Forbes neglects to discuss the prohibition of offsets.

In *Wissner v. Wissner*, 338 U.S. 655 (1950), the wife of a deceased Army officer had no community property interest in the proceeds of a federal insurance policy, the premiums of which were paid with community property. Federal law gave the service member the absolute right to designate the beneficiary, so **the state could not interfere** with that designation by awarding the proceeds to another, or **by awarding an equivalent amount under some other theory** (*Wissner, supra.*, 336 U.S. at 659).

Additionally, **the state judgment was, in effect, a seizure in violation of [former] 38 U.S.C. §816** (*Ibid.*).

> "Whether directed at the very money received from the government or an equivalent amount, the judgment below * * * cannot stand." (*Ibid.*)

The operative language of former §816 is identical, word-for-word, to the operative language of 38 U.S.C. §3101. Therefore, the offset of Major Mansell's longevity retirement pay is a seizure prohibited by §3101. Mrs. Forbes makes no attempt to demonstrate how the present case is

distinguishable from *Wissner*. She simply ignores the problem.

II
RELIANCE ON SENATE REPORT 97-502 IS MISPLACED BECAUSE THE SENATE BILL NEVER BECAME LAW

Mrs. Forbes relies almost entirely upon Senate Report 97-502 (R.B., *passim*; Supp. B., p. 9). However, this reliance is mostly misplaced. To begin with, Senate Report 97-502 is a report on Senate Bill 1814 which was rejected by Congress. The bill that eventually became FUSFSPA is Senate Bill 2248, as described in House Conference Report 97-749.

In addition to relying upon the wrong bill, Mrs. Forbes misinterprets the bill upon which she is relying. For instance, Mrs. Forbes strongly asserts that FUSFSPA is nothing more than a garnishment statute. However, even Senate Bill 1814, as reported in Senate Report 97-502, would have established three new substantive rights.

The first subject of S.1814 was the portion that allowed division of military retired pay. It is significant to note that the bill specifically addressed "military retired pay" rather than "**disposable retired or retainer pay.**" Thus, in S.1814, the Senate contemplated allowing division of all military retired pay. However, Congress discarded S.1814.

In addition to allowing division of military retired pay, S.1814 also proposed to extend health care coverage to certain former spouses. Furthermore, S.1814 would have allowed former spouses to participate in the Survivor

Benefit Plan. Thus, rather than a mere garnishment statute, S.1814 was a bill to provide three major new entitlement programs for former spouses.

The House amendment to the bill struck the entire Senate bill except the enacting clause and substituted text drafted by the House. The House version allowed division of retired pay only if the marriage lasted ten years and only if the court had jurisdiction over a member by reason of his residence in the state other than because of military orders, domicile, marriage in that state, or consent. In addition, benefits would terminate if the former spouse remarried before age 60.

The House version would have amended the Social Security Act to allow garnishment for non-payment of property settlements unrelated to the division of retirement pay. It also provided medical care for certain former spouses and directed authorization of commissary and exchange benefits to some unremarried former spouses. Coverage of a former spouse under the Survivor Benefit Plan was also provided. Finally, the House amendment contained a provision that would specifically direct that **nothing in the bill would overrule or require the modification of any state law** or court decision in any state that treats marital property as community property.

The Senate and House conferees met and agreed upon S.2248, which was enacted as Public Law 97-252, and contained FUSFSPA as Title X. The conferees agreed to remove the restriction that would require a ten year marriage. They also agreed to delete the termination of pay-

ments if the former spouse remarried before age 60. They agreed that the court must obtain jurisdiction over the member by reason of residence in the state other than because of military orders, domicile, or consent, but rejected jurisdiction based upon marriage in the state.

The new statute, like the abandoned S.1814, also established other major new benefits, including an entire new subdivision of 10 U.S.C. §1447 allowing former spouses to participate in the Survivor Benefit Plan (P.L. 97-252, Title X, §1003). Another new major benefit was the provision of medical coverage for former spouses by amendment 10 U.S.C. §§1072, 1076, and 1086 (P.L. 97-252, Title X, §1004). In addition, the new Act directed that certain former spouses shall be entitled to commissary and post exchange privileges (P.L. 97-252, Title X, §1005). Thus, FUSFSPA, as passed by the Senate and House, is a comprehensive Congressional scheme to provide four major, new entitlements for the former spouses of retired military members.

Finally, the conferees **renounced the House proposal that nothing in the statute would overrule or require the modification of any law** or court decision in any state that treats marital property as community property. Thus, Congress specifically recognized that FUSFSPA would overrule some state laws. Congress considered giving the states a free hand, but rejected the *laissez faire* approach in favor of the more carefully defined grant of authority.

III
DIFFERENCES BETWEEN FUSFSPA AND S.1814 DEMONSTRATE THAT ONLY DISPOSABLE RETIRED PAY MAY BE DIVIDED

Mrs. Forbes argues that FUSFSPA is merely a garnishment statute, and she purports to set forth the legislative history concerning the enforcement limitations. She claims that, as a garnishment statute, FUSFSPA places no limits on the state's power to award military retirement pay to former spouses. A review of the legislative history overcomes her assertions.

Page 1 of Senate 97-502 on the aborted Senate bill 1814[4], described it as "a bill to require compliance with certain court orders which **affect the retired or retainer pay.**" However, the conference report describes FUSFSPA as a bill to permit **disposable military retired pay** to be considered as property in divorce settlements under certain specified conditions (Conference Report Number 97-749, p. 165 [general description of FUSFSPA]). Thus, the Senate originally intended an unlimited waiver of sovereign immunity over military retirement pay. However, the joint conference committees decided to report a bill that provided a limited waiver of sovereign immunity affecting only **disposable retired or retainer pay**.

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4. S.1814 was actually two different bills. The first was introduced on Nov. 4 (leg. day, Nov. 2), 1981. The second version was introduced July 2 (leg. day, July 12), 1982. Both bills were rejected by Congress.

This rejection of a sweeping release of federal preemption is consistent with the earlier rejection of Senate Bill 1453[5] ["Nonpreemption of State Law"], 97th Cong., 1st Sess. (1981). That bill would have accomplished exactly what Mrs. Forbes is trying to do with FUSFSPA. However, like S.1814, the earlier S.1453 was specifically rejected.

A comparison of S.1814, which never became law, to S.2248, which eventually became FUSFSPA, demonstrates the lack of merit in Mrs. Forbes' position.

The term "court order" was defined in subsection (a)(2) of failed S.1814 as final decrees or orders which provide for the monthly payment of a "specified amount from the retired or retainer pay of a member to the spouse or former spouse of such member." The Senate version did not limit the scope of "court orders" to any particular part of the retirement pay. However, S.2248 (FUSFSPA), even as originally enacted, limited the definition of court orders to those which specifically provide for payment from "**disposable retired or retainer pay** of a member to the spouse or former spouse of that member." Thus, the Senate originally contemplated division of the **gross** retired pay. However, the joint conference determined that state court orders could only divide the **net disposable retired pay**.

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5. "* * * the law of the state in which the dissolution of marriage proceeding was instituted shall be dispositive on all matters pertaining to the division of any retired, retirement, or retainer pay to which such member or former member is entitled or will be entitled." (Senate Bill 1453, **"Nonpreemption of State Law,"** [S.1453, 97th Cong., 1st Sess. (1981)]).

IV
AMENDMENT OF THE TERM "COURT ORDER" DEMONSTRATES INTENT TO LIMIT STATE POWER TO DIVIDE RETIRED PAY

Further evidence of congressional intent to limit community property division of military retirement pay to the **net disposable retired pay** can be found in the evolution of the definition of a "court order" as set out in the statute. As pointed out above, the Senate version of the definition did not place limits on the power to divide the gross retired pay. However, under FUSFSPA, a "court order" was limited to those that provide for payment of an amount from the **disposable** retired pay. This limitation originally applied to payment of child support and alimony, as well as division of property. (10 U.S.C. §1408(a)(2)(A), (B), and (C). (See Pub.L. 97-252, Title X, §1002(a), Sept. 8, 1982, 96 Stat. 730)).

In a 1984 amendment to subsection (a)(2)(C), Congress removed the definitional limitation of a "court order" for child support and alimony by deleting the restriction that the order must specify that payments come from disposable retired or retainer pay. In other words, a court order may now allow any source for child support and alimony, including gross retired pay (Pub.L. 98-525, §643(a) (1984 amendment)). However, **Congress did not lift the restriction on community property division of the retirement pay**. Orders dividing retirement pay as community property still must specify "**disposable retired or retainer pay**."

The significance of the very carefully worded definition of "court order," and its subsequent modification, is further highlighted by the fact that a different definition of "court order" is used in that portion of FUSFSPA which amended 10 U.S.C. §1447 to allow former spouses to participate in the Survivor Benefit Plan (SBP).

V
THE LEGISLATIVE HISTORY OF PUB.L. 97-252 REFLECTS A LIMITED GRANT OF POWER TO DIVIDE MILITARY RETIREMENT PAY

The legislative history of FUSFSPA (Public Law 97-252, Title X, Sept. 8, 1982, 96 Stat. 730), reported at U.S. Code Congressional and Administrative News, 97th Congress 2nd session, 1982, pages 1555-1574 and 1596-1623, provides a general description of the new statute. Page 1603 of the legislative history recites that based on the record developed at the hearing, "* * * the committee believes that returning to the state courts--**with certain limitations**--the discretion to deal with military retired pay in divorce cases is a sound prescription for the admitted problems created by the *McCarty* decision."

In discussing the enforcement limitation for a portion of the retired pay, the legislative history, at page 1606, explains:

> "The committee believes that some reasonable accommodation must be made between the former spouse's existing rights under section 459 of the Social Security Act and the equitable concern that **some portion of the former member's disposable retired pay remain immune** from the existing enforcement mechanism and the new mechanism provided in this bill. * * *."

VI
JURISDICTION WAS PROPERLY NOTED

Mrs. Forbes asserts a number of arguments in an attempt to prevent the Court from deciding this case on its merits. However, none of the contentions have value.

A
LOWER COURT SILENCE CONCERNING PRE-EMPTION IS A REJECTION OF THE CHALLENGE

Mrs. Forbes continues to assert that this court does not have jurisdiction (Supp. B., page 13). Nevertheless, an appeal will lie even though the state court does not explicitly overrule a timely challenge to the validity of a state law (*Largent v. Texas*, 318 U.S. 418 (1943)). As long as the state law is upheld, the court has necessarily rejected Maj. Mansell's pre-emption challenge. The state court's silence concerning the constitutional challenge is immaterial and cannot destroy the right to appeal under 28 U.S.C. §1257(2). This silence is treated as equivalent to a finding of validity, so an appeal will lie (*Lawrence v. State Tax Commission*, 286 U.S. 276, 282-283 (1932)).

B
THE GOVERNMENT'S ARGUMENTS ARE FAIRLY INCLUDED WITHIN THE QUESTION PRESENTED

Mrs Forbes complains, at great length, that the government has expanded the issues presented in this ap-

peal (Supp. B., p. 3-8). However, the parties "are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed," and the parties may enlarge upon the questions they do present as long as the enlargement may be deemed **fairly included or comprised within the stated question** (*Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)).

The Jurisdictional Statement presented the question of whether the states may divide V.A. disability payments as community property. The analysis necessarily required an exploration of FUSFSPA because Major Mansell was required to waive a portion of his longevity retirement pay in order to receive the V.A. compensation. The analysis clearly asserted that "**[w]hat is important in the present case is the meaning and effect of FUSFSPA and its relationship with the anti-attachment provisions of 38 U.S.C. §3101.**" (J.S., p. 8).

Mrs. Forbes' Motion to Dismiss [M.D.], claimed that the anti-attachment protections of 38 U.S.C. §3101 are irrelevant because FUSFSPA allows her to obtain the money through other means (M.D. §II and p. 13-14). Thus, she brought the meaning of FUSFSPA into contention, even if the argument based on FUSFSPA in the body of the Jurisdictional Statement (J.S. p. 7-9) did not. Since all of the Government's arguments are addressed to the meaning and effect of FUSFSPA, it is difficult to understand Mrs. Forbes' claim that the Government has expanded the original Question Presented, particularly in light of the fact that the Court of Appeal decision was

devoted almost entirely to issues concerning FUSFSPA (J.S., App. D).

C
RES JUDICATA DOES NOT PRECLUDE MAJOR MANSELL'S PRE-EMPTION CLAIM

In a further effort to prevent the Court from addressing the important Federal pre-emption question, Mrs. Forbes claims that the decision of this Court cannot change the ultimate outcome of the case because she will return to state court and assert *res judicata* to prevent implementation of the Court's decision (Supp. B. p. 14-15). However, the lower court did address the attempt to prevent litigation on the merits.

Mrs. Forbes argued in the state court that the order denying modification was not reviewable. However, the Court of Appeal, relying entirely upon state law, found that it was required to reach the merits of the appeal (Opinion, §I [J.S., App. D-6 to 8]). Mrs. Forbes did not file a protective cross-petition for review in the California Supreme Court.

Further, and more significantly, Major Mansell's challenge is a collateral attack in the form of a motion to modify the judgment. A state court judgment which gives effect to a pre-empted state law is void and may be collaterally attacked (*Hoffman v. U.S.* 391 F.2d 195 (9th Cir., 1968)). Application of the pre-empted state law is "**unconstitutional, illegal and void.**" (*Lockheed Air Terminal, Inc. v. City of Burbank* 457 F.2d 667 (9th Cir.,

1972)). The federal pre-emption cases represent, upon compelling public policy grounds, one of the rare exceptions to the doctrines based upon the finality of judgments (*Carpenter's Pension Trust, etc. v. Kronschnabel* 460 F.Supp. 978, 980 (C.D. Cal, 1978), aff'd. 632 F.2d 45 (9th Cir., 1980), cert. den. 101 S.Ct. 3157 (1981)). Even if Mrs. Forbes does return to state court, she will be confronted wi[illegible]*dgway v. Ridgway*, 454 U.S. 46, 61 (1981), which squar[illegible] determined that **claims based on property settlement agr[illegible]nents** are not exempt from federal pre-emption. Not even a stipulated judgment in a state court can prevent exercise of a federal right.

D
LOWER COURT REJECTION OF THE RES JUDICATA CLAIM IS RES JUDICATA

Ironically, even if Mrs. Forbes does later try to assert *res judicata*, her claim must be rejected on *res judicata* grounds. She admits in her Supplemental Brief that she raised this issue in the trial and appellate courts (Supp. B., p. 14). She also admits that the courts failed to address the claim preclusion question and decided the case on the merits. As a matter of fact, the court determined that it was required, under state law, to address the merits (J.S. App. D 6-8). Mrs. Forbes did not file a protective cross-petition for review. Therefore, she is precluded by the doctrine of *res judicata* from reasserting the *res judicata* issue.

CONCLUSION

The decision of the Court of Appeal should be reversed and the case remanded.

December, 1988

Respectfully Submitted,

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AMICUS CURIAE

BRIEF

MOTION FILED
AUG 25 1988

(5)

No. 87-201

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GERALD E. MANSELL,

Appellant,

v.

GAYE M. (MANSELL) FORBES,

Appellee.

On Appeal from the Court of Appeal of California
Fifth Appellate District

MOTION TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE RETIRED OFFICERS ASSOCIATION, THE AIR FORCE SERGEANTS ASSOCIATION, THE FLEET RESERVE ASSOCIATION, THE U.S. COAST GUARD CHIEF PETTY OFFICERS ASSOCIATION, THE NATIONAL ASSOCIATION FOR UNIFORMED SERVICES, THE ASSOCIATION OF MILITARY SURGEONS OF THE UNITED STATES, THE NAVAL ENLISTED RESERVE ASSOCIATION, THE NAVAL RESERVE ASSOCIATION, THE NON COMMISSIONED OFFICERS ASSOCIATION OF THE U.S.A., THE RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES, THE RETIRED ENLISTED ASSOCIATION, THE U.S. ARMY WARRANT OFFICERS ASSOCIATION, AND THE U.S. COAST GUARD CHIEF WARRANT AND WARRANT OFFICERS ASSOCIATION IN SUPPORT OF THE APPELLANT

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OCTOBER TERM, 1988

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v.

GAYE M. (MANSELL) FORBES,
Appellee.

On Appeal from the Court of Appeal of California
Fifth Appellate District

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42(3) of the Rules of the Supreme Court of the United States, The Retired Officers Association, the Air Force Sergeants Association, the Fleet Reserve Association, the U.S. Coast Guard Chief Petty Officers Association, the National Association for Uniformed Services, the Association of Military Surgeons of the United States, the Naval Enlisted Reserve Association, the Naval Reserve Association, the Non Commissioned Officers Association of the U.S.A., the Reserve Officers Association of the United States, The Retired Enlisted Association, the U.S. Army Warrant Officers Association, and the U.S. Coast Guard Chief Warrant and

Warrant Officers Association (hereinafter *Amici*) * move this Court for leave to file the accompanying brief as *Amici Curiae* supporting the appellant, Gerald E. Mansell, in this case. In support of the motion, the Movants submit:

THE INTERESTS OF THE *AMICI*

The decision in this case effects the interests of more than 1,200,000 members represented by the *Amici.*

The organizations listed have an interest in this case because each association represents individuals who are serving, or who have served, or who have been associated with the armed forces of the United States. The issue in this case is important to each of the associations because it has the potential to effect the retirement pay of every active duty and retired member of the armed forces. The issue in this case also raises important questions as to whether the Federal Government or state courts will decide how much retired military personnel will receive from the armed forces in retired pay and veterans' disability benefits.

The Brief of the Appellant argues that disability benefits received by retired service members from the Veterans' Administration (VA) are not divisible under the community property laws; that 38 U.S.C. § 3101 (1983) protects VA disability benefits from any form of attachment except child support; that 38 U.S.C. § 3101 (1983) forbids a state court from offsetting a retired service member's VA disability benefits; that a retired service member's VA disability benefits are not a form of property subject to division under community property laws; and that the division of a retired service member's VA disability benefits under community property laws is an unconstitutional taking.

In addition to these arguments, the Brief of the *Amici Curiae* argues that since 1776, the Federal Government has paid disability benefits to American service personnel who have been injured, disabled, or who have suffered illness while serving in the Nation's armed forces. In addition, the Federal Government since 1861 has paid retirement benefits to Americans who have served honorably in the armed forces and who have met the statutory requirements to qualify for retirement. The Brief of the *Amici Cruiae* further argues that in enacting the McCarty Act in 1982, Congress revised the laws concerning the payment of military retirement benefits. The new law provides that a service member's "disposable retired" pay is subject to community property laws; but the new law also provides that veterans' disability benefits are not a part of a member's "disposable retired" pay and hence are not subject to division under community property laws. In conclusion, the Brief of the *Amici Curiae* argues that under the Supremacy Clause of the Constitution, Congress' deliberate decision to exclude veterans' disability benefits from division under state community property laws should prevail over a state court's decision to the contrary.

The consent of the attorney for the appellant in this case has been obtained, but the attorney for the appellee has refused to consent to the filing of a brief by the above listed associations as *amici curiae.*

For the reasons stated, Counsel for the *Amici Curiae* respectfully moves that the *Amici Curiae* be granted granted leave to file the accompanying brief *Amici Curiae* in this case.

Respectfully submitted,

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August 25, 1988

* The *amici* are more fully described in the Appendix to this brief.

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BRIEF *AMICI CURIAE* OF THE RETIRED OFFICERS ASSOCIATION, THE AIR FORCE SERGEANTS ASSOCIATION, THE FLEET RESERVE ASSOCIATION, THE U.S. COAST GUARD CHIEF PETTY OFFICERS ASSOCIATION, THE NATIONAL ASSOCIATION FOR UNIFORMED SERVICES, THE ASSOCIATION OF MILITARY SURGEONS OF THE UNITED STATES, THE NAVAL ENLISTED RESERVE ASSOCIATION, THE NAVAL RESERVE ASSOCIATION, THE NON COMMISSIONED OFFICERS ASSOCIATION OF THE U.S.A., THE RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES, THE RETIRED ENLISTED ASSOCIATION, THE U.S. ARMY WARRANT OFFICERS ASSOCIATION, AND THE U.S. COAST GUARD CHIEF WARRANT AND WARRANT OFFICERS ASSOCIATION IN SUPPORT OF THE APPELLANT

The Retired Officers Association, the Air Force Sergeants Association, the Fleet Reserve Association, the U.S. Coast Guard Chief Petty Officers Association, the

National Association for Uniformed Services, the Association of Military Surgeons of the United States, the Naval Enlisted Reserve Association, the Naval Reserve Association, the Non Commissioned Officers Association of the U.S.A., the Reserve Officers Association of the United States, The Retired Enlisted Association, the U.S. Army Warrant Officers Association, and the U.S. Coast Guard Chief Warrant and Warrant Officers Association respectfully submit this brief *Amici Curiae* in support of Appellant contingent upon the Court's granting the accompanying motion.

INTEREST OF THE *AMICI CURIAE*

The interest of *Amici Curiae* in this case is fully set forth in the accompanying motion.

STATEMENT OF THE CASE

The parties in this case were married in 1954 and were divorced in California in 1979. At the time of their divorce, appellant was a retired Air Force Major drawing retirement pay from the United States Air Force and disability benefits from the Veterans' Administration. At the time of the divorce, he was receiving approximately $1,200 per month in retirement payments from the Air Force and approximately $482 per month in disability benefits from the Veterans' Administration.

Upon deciding to divorce, the parties entered into a property settlement agreement. Under the terms of the property settlement agreement, appellant agreed in part to pay to his wife 50% of his retirement pay and 50% of his veterans' disability benefits until such time that one of them should die. The parties were divorced and the property settlement agreement was included as part of the divorce decree entered by the county court.

In 1983, the appellant asked the county court to modify the divorce decree by removing from the property settlement agreement the provision in which the appellant agreed to pay to his wife monthly 50% of his retirement pay and 50% of his veterans' disability benefits until one of them should die.

The county court denied the request on August 10, 1983, and the appellant appealed the decision of the county court to the California Court of Appeal in the Fifth Appellate Division. On appeal appellant argued that under the provisions of the Federal Uniformed Services Former Spouses' Protection Act (McCarty Act) and 38 U.S.C. § 3101(a), his VA disability benefits of $482 per month were not subject to division under California's community property law and that as a result, he did not have to pay to his wife 50% of his VA disability benefits each month.

The California Court of Appeal affirmed the decision of the county court and held that appellant's VA disability benefits were subject to division under California's community property law and that the provisions of the McCarty Act did not preclude the state from awarding 50% of his VA disability benefits to his former wife. The Court did not decide, however, whether 38 U.S.C. § 3101(a) precludes the state from dividing appellant's VA disability benefits under California's community property law.

The appellant appealed the decision of the California Court of Appeal to the Supreme Court of California, and Supreme Court of California denied appellant's appeal without opinion. The appellant appealed the California Court of Appeal's decision to this Court and this Court noted probable jurisdiction on June 27, 1988.

SUMMARY OF THE ARGUMENT

The *Amici Curiae* respectfully contend that when the dissolution of a marriage occurs, federal law precludes state courts from dividing Veterans' Administration disability benefits (VA disability benefits) pursuant to state community property laws.

Since 1776, the Federal Government has paid disability benefits to American service personnel who have been injured or disabled, or who have suffered illness, while serving in the Nation's armed forces. Since 1861, the Federal Government also has paid retirement benefits to Americans who have served honorably in the armed forces of the United States and who have qualified for military retirement. Throughout the history of the United States, the responsibility for paying benefits to disabled and injured American military service personnel and retirement pay to those Americans who have served honorably in the Nation's armed forces has been that of the Federal Government.

In response to the Supreme Court's decision in *McCarty v. McCarty*, 453 U.S. 210 (1981), Congress in 1982 revised the laws concerning the payment of military retirement benefits to retired service personnel. Under provisions of the new law, Congress provided that a retired service member's "disposible retired" pay is subject to state community property laws. In defining what "disposable retired" pay means, Congress carefully stated that it was the amount of money which a retired service member actually receives after various statutory deductions have been withheld from the service member's gross retirement pay. The deductions subtracted from the gross retirement pay, in other words, are not subject to community property laws, but what remains after the deductions have been made, namely, the member's "disposable retired" pay, is subject to community property laws.

One of the deductions Congress excluded from a service member's gross retirement pay are VA disability benefits received by a service member under Title 38 of the Code. Under the new law the amount to be withheld for the payment of VA disability benefits is to be subtracted from the member's gross retirement pay. The remainder of what is left, after the VA disability benefits are subtracted, is sent to the member and this is the member's "disposable retired" pay. The new law provides that the member's "disposable retired" pay is subject to division under community property laws, but that a member's VA disability benefits are not. In enacting the McCarty Act, Congress deliberately decided to exclude veterans' disability benefits from division by state community property laws, and under the Supremacy Clause, Congress' decision in this regard has to prevail over a state court's decision to the contrary.

For these reasons, Counsel for the *Amici Curiae* respectfully submits that the decision of the Court of Appeal of California in this case should be reversed.

ARGUMENT

UPON DISSOLUTION OF A MARRIAGE, FEDERAL LAW PRECLUDES A STATE COURT FROM DIVIDING VETERANS' ADMINISTRATION DISABILITY BENEFITS (VA DISABILITY BENEFITS) PURSUANT TO STATE COMMUNITY PROPERTY LAWS.

Counsel for the *Amici Curiae* respectfully contends, that upon the dissolution of a marriage, federal law precludes a state court from dividing Veterans' Administration disability benefits pursuant to state community property laws.

A. *Constitutional Provisions*

The Constitution of the United States grants Congress the power to "raise and support Armies," to "provide and maintain a Navy," and to "make Rules for the Govern-

ment and Regulation of the land and naval Forces." Art. 1, sec. 8, cls. 12-14. The Constitution also provides that Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution [all powers vested] in the Government of the United States, or in any Department or Officer thereof." Art. I, sec. 8, cl. 18. In addition, the Constitution provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and [that] Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

Under these provisions, Congress has responsibility for raising and supporting, and for governing and regulating the armed forces of the United States, and for enacting legislation necessary to accomplish this end. These provisions also provide that laws enacted by Congress to carry out its responsibilities in this regard are the "supreme Law of the Land" and that state court judges are bound by such laws notwithstanding existing state laws to the contrary.

Pursuant to Article I, Congress in 1789 enacted legislation to provide for payment of benefits to disabled American veterans—a practice which predates the admission of most of the States to the Union.[1] Pursuant to the same authority, Congress in 1861 also established a retirement system for military personnel who meet certain statutory criteria.

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[1] The admission into the Union of the 9 community property states occurred long after the Federal Government had begun paying benefits to disabled American veterans: Arizona (admitted February 14, 1912); California (admitted September 9, 1850); Idaho (admitted July 3, 1890); Louisiana (admitted April 30, 1812); Nevada (admitted October 31, 1864); New Mexico (admitted January 6, 1912); Texas (admitted December 29, 1854); Washington (admitted November 11, 1889); and Wisconsin (admitted May 28, 1848).

B. *Veterans' Disability Benefits*

Shortly after the Constitution was ratified, Congress authorized the Federal Government to pay benefits to disabled veterans who served in the Revolutionary Army.[2] The payment of benefits by the new Government to disabled veterans continued a policy begun in 1776 when the First Continental Congress authorized "monthly payments of up to half pay to officers, soldiers, and seamen disabled in the line of duty."[3] The practice of the Federal Government's issuing disability payments to disabled American veterans has continued to the present day with "[m]onthly payments [made] to veterans for service-connected disabilities [from] all our country's wars and conflicts as well as . . . peacetime service."[4]

The Federal Government has been actively involved in providing benefits for disabled American veterans since the founding of the Republic. What is significant is the quickness with which Congress moved in 1789 to exercise control over the award and payment of veterans' disability benefits and the speed with which it acted to relieve states of the responsibility of caring for those who were injured or disabled in the Revolutionary War. What is significant too is the continued interest and concern of Congress over the years in the treatment and care of citizens who have risked their lives in the defense of the nation in times of war and peace.

C. *Military Retirement Pay*

In 1861, Congress created a system of voluntary and involuntary retirement for officers serving in the armed forces of the United States. *See McCarty v. McCarty*,

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[2] Act of Sept. 29, 1789, ch. 24, 1 Stat. 95.

[3] M. Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227, 228-29 (1977).

[4] *Id.* at 229.

453 U.S. 210, 212 (1981). The new legislation creating the military nondisability retirement system provided in part that 'any commissioned officer of the army, or of the marine corps, [or any officer of the navy,] who shall have served as such for forty consecutive years, may, upon his own application to the President of the United States, be placed upon the list of retired officers, with the pay and emoluments allowed by this act." Act of Aug. 3, 1861, §§ 15, 21, 12 Stat. 289-90.

Congress also included in the retirement legislation provisions for retiring officers involuntarily when it became apparent that they were incapable of performing their duties and responsibilities. In part the legislation provided that any commanding officer of the army, marine corps, or navy "incapable of performing the duties of his office . . . shall be placed upon the retired list and withdrawn from active service and command and from the line of promotion" with pay. Act of Aug. 3, 1861, §§ 16, 22, 12 Stat. 289-90.

As Justice Blackmun explained in *McCarty v. McCarty*, 453 U.S. 210 (1981):

> The impetus for this legislation was the need to encourage or force the retirement of officers who were not fit for wartime duty. Thus, from its inception, the military nondisability retirement system has been "as much a personnel management tool as an income maintenance method,"; the system was and is designed not only to provide for retired officers, but also to ensure a "young and vigorous" military force, to create an orderly pattern of promotion, and to serve as a recruiting and re-enlistment inducement.

Id. at 212-13 (footnotes and citations omitted).

Thus, by the end of the Civil War, Congress, pursuant to its Constitutional powers, provided for the payment of benefits to disabled American veterans who were injured or disabled in the line of duty and created a system for

paying retirement benefits to officers who served their nation honorably in the armed forces of the United States.

D. *Limits on Receipt of Dual Benefits*

In 1890, "Congress became concerned with the increasing drain of retirement pay and disability pensions on the public treasury." *Absher v. United States*, 9 Ct. Cl. 223, 225 (1985), *aff'd*, 805 F.2d 1025 (Fed. Cir. 1986), *cert. denied*, —— U.S. —— (No. 86-1312, April 27, 1987). For this reason, Congress enacted a law which prohibited retired officers from receiving both retirement pay and disability payments too. In an amendment to a previous Act, Congress provided that: "Hereafter no officer of the Army, Navy, or Marine Corps on the retired list shall draw or receive any [disability] pension under any law." Act of August 29, 1890, chap. 820, 26 Stat. 371. *See* 21 Cong. Rec. 8510-11 (1890). In 1891, Congress broadened the provisions of this statute to prohibit officers, noncommissioned officers, and privates from receiving disability pensions while they were serving on active duty or in a retired status.

> [H]ereafter no [disability] pension shall be allowed or paid to any officer, non commissioned officer, or private in the Army, Navy or Marine Corps of the United States, either on the active or retired list.

Act of March 3, 1891, ch. 548, 26 Stat. 1082. *See* 22 Cong. Rec. 2191-92 (1891). Under this legislation, neither active duty personnel nor retired personnel could receive disability benefits if they were receiving active duty pay or retired pay.

The purpose of imposing this restriction on members of the armed forces was to limit the amount of compensation active duty military personnel and retired military personnel could receive from the Federal Government. This amendment eliminated the practice of military service personnel collecting two checks from the Federal

Government each month: one check for disability benefits and the other check for retired pay or active duty pay.

The Congressional prohibition against members of the armed forces receiving any form of dual benefits remained in effect for approximately 50 years. *See* Act of Jul. 27, 1892, chap. 277, 27 Stat. 282; Act of May 9, 1900, chap. 385, 31 Stat. 171; Act of Feb. 6, 1907, chap. 468, 34 Stat. 879; Act of May 11, 1912, chap. 123, 37 Stat. 113; Act of Jun 5, 1920, chap. 245, 41 Stat. 982; Act of Jun. 7, 1924, chap. 320, 43 Stat. 623.

E. *Restriction on Receipt of Dual Benefits Modified*

In 1941, Congress partially ended the prohibition which precluded military personnel from receiving both disability payments and retirement or active duty pay. In the Act of June 30, 1941, Congress allowed *retired enlisted personnel*, who were eligible to receive disability benefits from the Veterans' Administration, to "waive receipt of [their] retired pay and allowances for the purpose of receiving [a disability] pension or compensation." Act of Jun. 30, 1941, chap. 263, 55 Stat. 395 (emphasis added). In 1944, Congress broadened the provision to allow a waiver by "*any person* who is receiving pay pursuant to any provision of law relating to the retirement of persons in the regular military or naval service, and who would be eligible to receive [a disability] pension or compensation under the laws administered by the Veterans' Administration." Act of May 27, 1944, chap. 209, 58 Stat. 230 (emphasis added). Under the 1944 Act, any retired military person who was eligible for disability benefits could "receive [a disability] pension or compensation upon . . . filing . . . a waiver of . . . his retired pay and allowances [in an amount] equal [to] such [disability] pension or compensation." *Id.* at 230-31.

The changes enacted by Congress in 1944 are basically the law today. Under the current provisions of Section

3105 in Title 38 of the United States Code, "[r]etirees are no longer required to choose between retired pay or disability benefits; instead retirees are allowed to waive as much of their retirement pay as they are eligible to receive in VA disability benefits."[5] *Absher v. United States*, 9 Ct. Cl. 223, 225 (1985), *aff'd*, 805 F.2d 1025 (Fed. Cir. 1986), *cert. denied*, —— U.S. —— (No. 86-1312, April 27, 1987). As a practical matter, most retirees opt "to waive as much of their retirement pay as they are eligible to receive in VA disability benefits" because disability benefits from the Veterans' Administration are exempt from federal and state taxation. By choosing to waive their retirement pay and receive their veterans' disability benefits instead, retired military personnel can increase their after-tax income. *Id.* The tax

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[5] Section 3105 of Title 38 of the Code provides:

> Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Veterans' Administration of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay.

38 U.S.C. § 3105 (1982, Supp. IV, 1986).

> [T]he waiver requirement saves the Air Force nearly 590 million dollars per year[;] . . . . the government estimate[s] savings for all uniformed services at more than two billion dollars per year.

Absher v. United States, 9 Ct. Cl. 223, 227 n.* (1985), *aff'd*, 805 F.2d 1025 (Fed. Cir. 1986), *cert. denied*, —— U.S. —— (No. 86-1312, April 27, 1987).

savings American veterans receive by making this election is the result of a conscious decision on the part of Congress to give this group of Americans an additional benefit in recognition of their national service.

For over 200 years the Federal Government has made disability payments to America's veterans for injuries and illnesses received in the defense of the nation during wartime and peacetime. Since the Civil War too, the Federal Government has made retirement pay available to military personnel who meet the statutory requirements for military retirement. In providing for the payment of disability benefits to veterans injured in the service of their country and in providing military retirement payments to those who have served a career in the armed forces, Congress has fulfilled its Constitutional responsibility for supporting and maintaining, and for governing and regulating the armed forces. In accordance with these provisions, Congress has accomplished what it deemed necessary to provide for the needs of personnel serving in the armed forces of the United States.

F. *The* McCarty *Decision*

In 1981, this Court in *McCarty*, *supra*, acknowledged that Congress has the responsibility for raising and supporting the nation's military forces. In *McCarty*, the issue before the Court was "whether, upon the dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws." 453 U.S. at 211.

Because the Court concluded that the California community property law was in conflict with the federal military retirement statute and because the Court found that the application of the California community property law "to military retired pay threatens grave harm to 'clear and substantial' federal interests," *id.* at 232, the Court held that the service member's nondisability

military retirement pay could not be divided as property under California's community property law. *Id.* at 236. In so holding, the Court recognized the importance of Congress' responsibility in raising and supporting the nation's military forces, and admitted its reluctance to involve itself in matters of national defense and military affairs. In this regard, it observed "that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs."[6] *Id.*

In conclusion, the Court, consistent with its policy of deference, stated that if "more protection should be afforded a former spouse of a retired service member," the "decision . . . is for Congress alone" to make and not for the Court to decide. *Id.* at 235-36.

G. *The McCarty Act*

In response to the Court's decision in *McCarty*, Congress the following year enacted the Federal Uniformed Services Former Spouses Protection Act [McCarty Act], Pub. L. 97-252, Title X, 96 Stat. 730-38 (1982).[7] In the McCarty Act, Congress amended the military retirement laws to permit a former spouse to claim as commmunity property a portion of a service member's nondisability retirement pay. The primary reason for the amendment

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[6] For examples of such deference, *see Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (constitutionality of draft upheld); *Schlesinger v. Ballard*, 419 U..S 498, 510 (1975) (Navy's mandatory discharge provisions held not to violate due process clause); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (accused's conviction for knowingly destroying his Selective Service registration card held not to be in violation of the First Amendment); *Ex parte Quirin*, 317 U.S. 1, 25-26 (1942) (petitioners lawfully held in custody for trial by military commission).

[7] 10 U.S.C. § 1408 (1982, Supp. IV, 1986). *See* Horkovich, *Uniform Services Former Spouses' Protection Act: Congress' Answer to McCarty v. McCarty Goes Beyond the Fundamental Question*, 23 AIR FORCE LAW REV. 287 (1982-83).

was to reverse the effect of the Court's decision in *McCarty*.[8]

Under the McCarty Act, a service member's "disposable retired . . . pay" may be treated "as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction." 10 U.S.C. § 1408(c)(1) (1982, Supp. IV, 1986). The effect of the change is that state courts can now divide or not divide a service member's disposable retired pay depending on the statutory law of a state and its local judicial decisions.

H. *Disposable Retired Pay*

The McCarty Act provides that a service member's "disposable retired pay" may be treated as property of the member and his spouse in a community property state. "Disposable retired pay" is defined by the Act as follows:

> (4) *"Disposable retired . . . pay" means the total monthly retired . . . pay to which a member is entitled . . . less amounts which—*
>
> (A) are owed by that member to the United States;
>
> (B) *are required by law to be and are deducted from the retired . . . pay of such member, including* fines and forfeitures by courts-martial, Federal employment taxes, and *amounts waived in order to receive compensation under . . . title 38.*
>
> (C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than

[8] S. REP. No. 502, 97th Cong., 2d Sess. 1; H.R. REP. No. 749, 97th Cong., 2d Sess. 165; 128 Cong. Rec. 18314 (statement by Rep. Schroeder).

> would be authorized if such member claimed all dependents to which he was entitled.
>
> (D) are withheld under section 3402(i) of the Internal Revenue Code of 1986 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;
>
> (E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or
>
> (F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such members's retired or retainer pay is being made pursuant to a court order under this section.

10 U.S.C. § 1408(a)(4) (1982, Supp. IV, 1986) (emphasis added). Under this definition, "disposable retired" pay is the amount of retired pay a service member actually receives after the various deductions have been made, and this is the pay that the state courts can divide under the community property laws.

The amended statute plainly states that "disposable retired" pay is the total monthly pay that a retired service member is entitled to receive *minus* certain deductions provided in the statute.[9] The "*gross*" amount of a service

[9] *Id.* The deduction set forth in (4)(B), the "amount waived in order to receive [VA disability benefits] under . . . title 38," is one of several deductions excluded from "disposable retired . . . pay. Congress also specifically provided that several other amounts should be excluded from "disposable retired . . . pay," federal income withholding tax being the most common exclusion, but only the deduction for veterans' disability benefits is the subject of the present case.

> The specific deductions that are to be made from the total monthly retired . . . pay generally parallel those existing deduc-

member's retired pay is the amount of retirement pay the service member is *entitled to receive based on longevity of the service* in the armed forces. The service member's "*disposable retired pay*," in contrast, is the amount of retirement pay which the service member *actually receives after various deductions* provided for by the statute are *withheld*.

One of the deductions that the statute specifically provides can be withheld is the amount of federal retirement pay waived by a service member in order to receive VA disability benefits.[10] As noted previously, Section 3105 of Title 38 provides that "[a]ny person who is receiving . . . retirement . . . pay and who would be eligible to receive [a] pension or compensation under the laws administered by the Veterans' Administration . . . shall be entitled to receive [a] pension or compensation upon the filing . . . of a waiver of so much of [the] person's

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tions which may be made from the pay of Federal employees and military personnel before such pay is subject to garnishment for alimony or child support payments under section 459 of the Social Security Act (42 U.S.C. 659). These deductions include amounts owed to the United States; amounts required by law to be and which are deducted from retired pay, including amounts of retired pay withheld in order for the member to receive compensation from Veterans' Administration under title 38 or to receive pay under title 5 for employment by the United States; amounts properly withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) which are in excess of amounts normally withheld for income tax purposes; amounts deducted for the purpose of payment of Government life insurance premiums (but not additional coverage under such life insurance policies); and amounts deducted from a member's retired . . . pay for an annuity under the Survivor Benefit Plan, but only if that annuity is to be provided for the spouse or former spouse of the member to whom the payment of a portion of the member's monthly retired . . . pay is being made because of a court order in question.

S. REP. No. 502, 97th Cong., 2d Sess. 14-15.

[10] 10 U.S.C. § 1408(a)(4)(B).

retired or retirement pay as is equal in amount to such pension or compensation." 38 U.S.C. § 3105 (1988 Supp.) (emphasis added). Section 3105, in sum, permits military retirees "to waive as much of their retirement pay as they are eligible to receive in VA disability benefits." *Absher v. United States*, 9 Ct. Cl. 223, 225 (1985), *aff'd*, 805 F.2d 1025 (Fed. Cir. 1986), *cert. denied*, —— U.S. —— (No. 86-1312, April 27, 1987). In order for a service member to obtain the VA disability benefits to which he is entitled, the member has to waive the amount of his retired pay equal to the amount of VA disability compensation he is entitled to receive. The amount of retirement pay waived by the service member is then deducted from the member's monthly retirement check. The reduced retirement check that the member receives each month is his "disposable retired pay."

I. *Error of the California Court of Appeal*

In the present case appellee contends that a service member's "gross" retirement pay, that is, the total amount of retirement pay the service member is entitled to receive irrespective of deductions, is subject to division under community property laws. Appellee Motion to Dismiss, at 9. In making this argument appellee concedes that a service member's veterans' disability payment is not "subject to division under community property laws." [11]

So long as no deductions are withheld from the retired member's "gross" retirement pay, the whole amount of the retirement pay may be subject to division under

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[11] Appellee's Motion to Dismiss at 9-10. Having conceded that veterans' disability benefits are not subject to division under community property laws, it follows that appellee also would concede that Congress has the power under Section 3105 of Title 38 of the United States Code to permit a retired service member to elect between receiving full military retirement benefits, or waiving a portion of his retirement up to the amount of the VA disability benefits he is entitled to receive.

community property laws. But if deductions are withheld from the retired member's retirement pay under Section 1408(a)(4) of the McCarty Act, only the amount which remains after the deductions are subtracted is subject to division under community property laws. This amount is the service member's "disposable retired" pay and it is this amount Section 1408(c)(1) states is property of the member and the spouse which can be divided under community property laws.

If a retired service member is entitled to receive a monthly retirement check of $1,000 per month and no deductions are withheld from it, then under appellee's theory, the whole $1,000 is subject to division under community property laws. Where, however, the retired service member is entitled to receive $300 in veterans' disability benefits and the member elects to waive $300 of his retirement pay in order to collect the $300 in veterans' disability benefits, the $300 veterans' disability benefit will be deducted from the member's retirement pay and the member only will receive a retirement check for $700. The $300 amount will be deducted from the member's retirement check because Section 1408(a)(4)(B) of the McCarty Act states that "amounts waived in order to receive compensation under . . . title 38" will be deducted from the members "total monthly retired . . . pay." The amount of retirement pay the member receives after a deduction of $300 for his veterans' disability benefits, namely $700, is the member's "disposable retired . . . pay" according to the definition of "disposable retired . . . pay" in Section 1408(a)(4)(B) of the McCarty Act.[12]

Appellee nevertheless contends that the retired member's $1,000 "gross" retirement would be subject to division under California's community property law, and not the $700 which is the member's "disposable retired . . . pay" after the $300 deduction for veterans' disability

[12] *See* S. REP. No. 502, 97th Cong., 2d Sess. 18.

benefits has been subtracted from the member's retired pay. The problem with appellee's argument is that it is inconsistent. On the one hand appellee concedes that the $300 veterans' disability benefit is not subject to division under community property law. Yet, on the other hand, appellee argues that the service member's $1,000 "gross" retirement pay, that is, the $300 in veterans' disability benefits and the $700 in retirement pay, is subject to division under community property law.

The problem for appellee is how to characterize the veterans' disability benefit.[13] Either the $300 in veterans' disability benefits received by the retired service member is subject to division under community property law or it is not. Not only has Congress never stated that veterans' disability benefits are subject to division under community property laws, but Congress, in fact, has specifically precluded such action. In Section 3101 of Title 38 Congress makes clear that veterans' disability benefits are to be paid to the individual entitled to the benefit and not to anyone else. In this regard, Congress has stated that veterans' disability benefits "shall not be assignable" and that such benefits "shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, lien, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."[14] It is

[13] Appellee's problem is compounded to absurdity when reference is made to the other deductions which can be withheld from a member's retired pay under Section 1408(a)(4) of the McCarty Act. If a service member is entitled to receive $1000 in gross retirement pay and $100 is deducted for sums owed to the United States, $200 is deducted for federal income tax, and $300 is deducted for a waiver of retirement for disability benefits, the member's disposable retired pay is only $400. Yet appellee must argue that $500 has to be paid to the former spouse under the community property statute, including $100 which does not exist.

[14] 38 U.S.C. 3101 (1983). *See* Act of March 3, 1873, chap. 234, sec. 33, 17 Stat. 576; Act of August 12, 1935, chap. 510, sec. 3, 49 Stat. 609.

doubtful, in light of Congress' express language to protect veterans' disability benefits, that Congress intended, in its amendment of the military retirement laws, to implicitly permit veterans' disability benefits to become subject to division under community property laws. Not only are implicit repealers highly disfavored, but also none exist here because Congress has explicitly excluded veterans' disability benefits from the McCarty Act.

It is more consistent to argue that under the provisions of the McCarty Act, Congress intended only for the service member's "disposable retired pay" to become subject to division under community property laws.

What is at the heart of the issue in this case is the veterans' disability benefit received by the retired service member, which here is the difference between appllant's "gross" military retirement pay and his "disposable" military retirement pay. This is not an issue about whether a former spouse is receiving an adequate level of support, but it is a case concerning the division of a retired service member's property right, that is, the right of a retired service member to receive his veterans' disability benefits.

As noted, the payment of VA disability benefits is a matter entrusted to the power of the Federal Government. The Congress has been granted the power under the Constitution to support and maintain the armed forces, and in accordance with this power, Congress, for more than 200 years, has provided for the payment of disability benefits to American veterans. In fact, Congress has even enacted special laws to ensure that disabled veterans actually receive payments to which they are entitled. In short, Congress has the decisionmaking power over the payment of veterans' disability benefits to retired and active duty personnel and it is not a subject on which states or state courts should have anything to say.

J. *Supremacy Clause*

For many years Congress prohibited retired and active duty service personnel from receiving disability benefits if they were drawing retired pay or active duty pay. Today, Congress permits a military retiree to waive a portion of his military retirement benefits up to the amount of the VA disability benefit which the member is entitled to receive. In enacting the McCarty Act, there is no indication that in its attempt to provide compensation to the spouses of retired military personnel, Congress intended to allow veterans' disability benefits to become divisible property under state community property laws. Nor is there an indication that Congress intended for any of the other deductions listed in Section 1408(a)(4) to become divisible property under state community property laws.

To read the McCarty Act in the manner proposed by appellee also has the effect of rendering the "protection of benefits" provisions of Section 3101 of Title 38 and the "election" procedures in Section 3105 of Title 38 meaningless. A sounder reading of the McCarty Act, and one which preserves the validity and integrity of Sections 3101 and 3105, is one in which "disposable retired pay" is read as it is defined in the plain language of Section 1408(a)(4).

By clearly providing in Section 1408(a)(4) that "disposable retired . . . pay means the total monthly retired . . . pay to which a member is entitled . . . less amounts which" are deducted or withheld, and by further stating in Section 1408(c)(1) that "disposable retired . . . pay" may be treated "as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction," the Congress of the United States "has 'positively required by direct enactment' that California's community property law [is] pre-empted by the provisions governing military retired

pay" and by the provisions governing the payment of veterans' disability benefits. *McCarty, supra* at 236 (Rehnquist, J., dissent). This is not an instance of "Congress' *failure* to act"; nor is it a case involving "vague implications from tangentially related enactments." *Id.* at 237. Instead, it is a carefully aimed "rifle shot" where Congress has made perfectly clear that "disposable retired . . . pay" and "disposable retired . . . pay" only is subject to division under local community property laws.

If state courts are able to decide whether or not retired military personnel can receive VA disability benefits, then the state courts and not the Congress will decide how veterans' benefits are to be distributed. If this occurs, then the decisions of state courts will take precedence over the decisions made by Congress in an area in which Congress has been delegated specific authority to act and in which it has acted for more than 200 years. If state courts, in other words, are able to decide how veterans' disability benefits are to be distributed or divided, then state courts will be in a position of deciding how the armed forces of the United States will be supported and maintained and how Congressional rules governing and regulating such forces will be interpreted. The practical effect of allowing state courts to make decisions concerning the division and distribution of veterans' benefits is to take away from the Federal Government the power and responsibility delegated to it by the Constitution and to vest it in various state courts located throughout the United States.[15]

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[15] One result of the McCarty Act is that it imposed administrative responsibilities on the Federal Government to honor state court divorce decrees concerning disbursements of military nondisability retirement pay. The effect of the state court's decree in the present case is that it may impose an additional administrative burden on the Federal Government. This will occur when, in response to a state court decree, the Federal Government will have to calculate the amounts due to a former spouse from the various agencies of the

The better approach is to let Congress resolve all questions concerning the payment of VA disability benefits to retired military personnel and not to allow state courts to decide which federal statutes will be enforced and which will be ignored. Once the Congress decides what portion of a service member's retirement pay is to be treated "as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court," then the state courts can act on the decision in accordance with local rules. 10 U.S.C. § 1408(c)(1) (1982 Supp. IV, 1986). If Congress disagrees with the manner in which the language of Sections 1408(a)(3) or (4) are being interpreted by state courts, then it is Congress' responsibility to change the statute to comport with its interests and desires. *See generally Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 516-17 (1839).

Once the protections of veterans' disability benefits provided for in the statutes have been honored, and after the retired personnel have waived or not waived their retirement benefits in order to receive veterans' benefits, then and only then should the state courts be able to apply local laws in determining the distribution of community property assets. In an area of special concern to the Congress, like national defense or military affairs, state courts must apply the laws of the United States in such a way as to give full meaning and effect to the intentions of Congress and not substitute their own personal preferences or desires. In interpreting federal law, state courts also must not slight or ignore federal statutes for the purpose of achieving narrow state objectives.

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government. For example, 50% of appellant's Air Force retirement would have to be paid directly to the spouse by the Air Force and 50% of appellant's VA disability benefits would have to be paid directly to the spouse by the Veterans' Administration. The more deductions held subject to community property laws, the more complicated the process would become. *See supra* note 13.

In the present case, a state court has allowed the interests of the state, in applying its community property laws to divorce actions, to interfere with and overshadow the dictates of federal law.[16] An analysis of the facts in the present case reveals that this application of the community property law of the State of California is in conflict with Sections 3101 and 3105 of Title 38; that the application of the community property law by the state court contravenes the clear language of Section 1408 in Title 10 and diminishes the value of the benefit Congress has determined should go to the retired member; and that the application of the California community property law to the appellants' veterans' benefits penalizes the one whom Congress sought to protect. *See generally Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979).

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall stated that "the government of the Union, though limited in its powers, is supreme within its sphere of action" and that "its laws, when made in pursuance of the Constitution, form the supreme law of the land." *Id.* at 405 and 406. "[T]he constitution," he said, "and the laws made in pursuance thereof are supreme; [and] they control the constitutions and laws of the respective States, and cannot be controlled by them." *Id.* at 426. In short, he observed that, "the

[16] *See McCune v. Essig*, 199 U.S. 282 (1905) (explicit schedule of succession set forth in the Homestead Act dictated succession to title in the event of homesteader's death); *Wissner v. Wissner*, 338 U.S. 655 (1950) (federal statute provides that beneficiaries to National Service Life Insurance policy are to be designated by service member); *Free v. Bland*, 369 U.S. 633 (1962) (Treasury Regulations specifically provided for succession upon the death of co-owners of U.S. Savings Bonds); *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964) (Federal Treasury regulations held to govern survivorship to ownership in U.S. Savings Bonds); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (Railroad Retirement Act clearly provides that retirement benefits are for retiree).

States have no power . . . to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.* at 436.

In *United States ex. re. Toth v. Quarles*, 350 U.S. 11 (1955), Justice Black, commenting on the role of the armed forces in American society, stated that "it is the primary business of armies and navies to fight or to be ready to fight wars should the occasion arise." *Id.* at 17. Consistent with this view, the Court has noted that the "responsibility for determining how best our Armed Forces shall attend to that business rests with Congress . . . and with the President." *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975). In addition, the Court has acknowledged that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

For over 200 years, Congress has developed an extensive set of rules and regulations governing the treatment of veterans and the payment of disability benefits to veterans and retirees for injuries and illnesses received in battle and in performance of other services to the Nation. The laws enacted by Congress concerning veterans benefits and military retirements are detailed and explicit and have been exposed to the test of time. The purpose of such laws is not only to compensate military personnel for their service to the Nation, but also to ensure that former members of the armed forces will be treated equally and fairly wherever they may reside. For these reasons, the Constitution delegated the power to support and maintain the fighting force to the Congress. In such matters, the decisions of Congress are supreme and must be adhered to by state courts.

In the present case, this has not occurred. By using the service member's "gross" retirement pay rather than

his "disposable retired pay" in order to determine what property is subject to division under California's community property law, the state court has ignored the plain language of Section 1408(a)(4)(B) of the McCarty Act and the intent of Congress expressed in that section to protect veterans' benefits from being divided under community property laws. This case, in sum, is the latest chapter in the continuing saga of state courts attempting to control federal military benefits through local divorce proceedings with little, if any, concern for Congress' long involvement in the area.

CONCLUSION

For the reasons stated, Counsel for the *Amici Curiae* respectfully requests that the decision of the Court of Appeal of California for the Fifth Appellate District be reversed, and that the Court hold that appellant's right to receive veterans' disability benefits not be diminished or diluted by the application of California's community property law in the absence of the consent of the Congress of the United States.

Respectfully submitted,

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August 25, 1988

APPENDIX

DESCRIPTION OF AMICI ORGANIZATIONS

THE RETIRED OFFICERS ASSOCIATION

The Retired Officers Association was founded in 1929 and has approximately 357,000 members. Membership in the Association is open to all past and present, active and reserve commissioned and warrant officers in any of the seven uniformed services. The organization's mission is "to support strong national defense and to represent membership on retirement and benefit issues."

AIR FORCE SERGEANTS ASSOCIATION

The Air Force Sergeants Association was founded in 1961. It has 161,000 members and is composed of active and retired enlisted personnel in the Air Force, Air National Guard, Air Force Reserve, Army Air Corps and Army Air Force. Its members belong to 198 chapters throughout the world and the purpose of the organization is "to serve as the voice of Air Force enlisted service members."

FLEET RESERVE ASSOCIATION

The Fleet Reserve Association was founded in 1922. It has 150,000 members who are active duty, retired enlisted personnel and commissioned officers with prior service in the Navy, Marine Corps and Coast Guard. The Association is chartered under the laws of Pennsylvania and its purpose is "to represent its members on military personnel legislative matters before Congress."

U.S. COAST GUARD CHIEF PETTY OFFICERS ASSOCIATION

The U.S. Coast Guard Chief Petty Officers Association was founded in 1969. It's 9,000 members are active, retired, and reserve Coast Guard chief petty officers. The

mission of the Association is "to promote the welfare of chief petty officers and aid in Coast Guard recruiting."

NATIONAL ASSOCIATION FOR UNIFORMED SERVICES

The National Association for Uniformed Services was founded in 1968. The National Association has 56,000 members and its membership consists of all grades and ranks of past and present members of the uniformed services, surviving spouses and children of deceased active and retired military personnel. The Association's mission is to represent its "members to Congress and the executive branch and support a strong national defense."

ASSOCIATION OF MILITARY SURGEONS OF THE UNITED STATES

The Association of Military Surgeons of the United States received its Congressional Charter in 1903. Its membership consists of 17,000 members and is open to all past and present commissioned officers or GS-9 and above civilians in the medical services of the United States Air Force, the United States Air Force Reserve, the United States Army, the United States Army Reserve, the United States Coast Guard, the United States Navy, the United States Navy Reserve, the Air National Guard, the Army National Guard, the United States Public Health Service and the Veterans' Administration; officers of military medical services of other nations; and past and present medical consultants to the chiefs of the federal medical services. The purpose of the Association is "to improve the nation's federal health care system."

NAVAL ENLISTED RESERVE ASSOCIATION

The Naval Enlisted Reserve Association was founded in 1957. It has 16,000 members and its membership is open to active, inactive, and retired enlisted reservists in the Navy, Marine Corps and Coast Guard. The Association's mission is "to focus on members' interests, morale and well-being and readiness and training of sea service reserve forces."

NAVAL RESERVE ASSOCIATION

The Naval Reserve Association was founded in 1954 and consists of 24,000 members. Membership in the Naval Reserve Association is open to active, inactive and retired Naval Reserve officers and its purpose is "to maintain and strengthen the nation's defense by ensuring a continued strong Navy and Naval Reserve."

NON COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES

The Non Commissioner Officers Association of the United States is a patriotic, civic and fraternal organization operating under Texas Corporate Charter. The Association was founded in 1960 and has more than 160,000 members. Its membership consists of active, reserve, retired or veterans of the United States armed forces in the grades E-4 thru E-9. The purpose of the Association is "to promote and protect the rights and benefits of active duty and veteran non commissioned officers and petty officers in all five branches of the armed forces and to provide opportunities for them to join in patriotic, fraternal, social and benevolent activities."

RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

The Reserve Officers Association of the United States was organized in 1922, and chartered by Congress in June 1950. Originally, the Reserve Officers Association consisted solely of Army Officers, Reserve Officers, National Guard Officers, and Retired Officers. Following World War II, the Reserve Officers Association expanded its membership to all services and it now has approximately 120,000 members. The purpose of the Association

is "to ensure an adequate total force of all services including both active and reserve components and a force that is mobilization ready to meet any contingency."

THE RETIRED ENLISTED ASSOCIATION

The Retired Enlisted Association was founded in 1963 and consists of 50,000 members. Its membership is made up of enlisted retirees from all branches of the armed services and their surviving sponses. The mission of the Association is "to represent retired enlisted personnel and protect retiree military benefits."

U.S. ARMY WARRANT OFFICERS ASSOCIATION

The U.S. Army Warrant Officers Association was founded in 1973 and has 4,000 members. Its members consist of active duty, National Guard, reserve and retired Army warrant officers. The purpose of the Association is "to recommend improvement of the Army and promote technical and professional information among warrant officers."

U.S. COAST GUARD CHIEF WARRANT AND WARRANT OFFICERS ASSOCIATION

The U.S. Coast Guard Chief Warrant Officers and Warrant Officers Association was founded in 1929 and has 3,261 members. The Association's membership is open to past and present active duty, reserve and retired Coast Guard warrant and chief warrant officers and its mission is to advance its members' professional abilities.

AMICUS CURIAE

BRIEF

MOTION FILED
OCT 8 1988

No. 87-201

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GERALD E. MANSELL,

Appellant,

v.

GAYE M. (MANSELL) FORBES,

Appellee.

On Appeal from the Court of Appeal of California Fifth Appellate District

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE WOMEN'S EQUITY ACTION LEAGUE, THE NOW LEGAL DEFENSE AND EDUCATION FUND, THE AMERICAN ASSOCIATION OF RETIRED PERSONS, THE EX-PARTNERS OF SERVICEMEN/WOMEN FOR EQUALITY, THE NATIONAL ACTION FOR FORMER MILITARY WIVES, THE NATIONAL ORGANIZATION FOR WOMEN, THE OLDER WOMEN'S LEAGUE, THE OLDER WOMEN'S LEAGUE (SACRAMENTO CAPITOL CHAPTER), THE PENSION RIGHTS CENTER, AND THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF THE APPELLEE

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IN THE

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OCTOBER TERM, 1988

No. 87-201

GERALD E. MANSELL,

Appellant,

v.

GAYE M. (MANSELL) FORBES,

Appellee.

On Appeal from the Court of Appeal of California
Fifth Appellate District

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rules 36.3 and 42 of the Rules of the Supreme Court of the United States, the Women's Equity Action League, the NOW Legal Defense and Education Fund, the American Association of Retired Persons, the Ex-Partners of Servicemen/women for Equality, the National Action for Former Military Wives, the National Organization for Women, the Older Women's League, the Older Women's League (Sacramento Capitol Chapter), the Pension Rights Center, and the Women's Legal Defense Fund (hereinafter *Amici Curiae*) respectfully move this Court for leave to file the accompanying brief as *Amici Curiae* supporting the Appellee, Gaye M. (Mansell) Forbes, in this case. In support of the motion, the Movants submit:

THE INTERESTS OF THE AMICI

The *Amici Curiae* are ten organizations comprising over 30 million members whose interests are directly affected by the issues presented in this case.

The *Amici Curiae* are concerned with the adverse impact of divorce on the economic interests of former spouses of uniformed servicemembers throughout the United States. Each of the applicant organizations has a special interest, involvement, and expertise in the issue of a spouse's right at the time of divorce to claim a share of the retirement benefit earned during the marriage (*see* Appendix).

In supporting the Brief of the Appellee, the *Amici Curiae* agree that the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) does not expressly prohibit state courts from dividing military retired or retainer pay based on the total retirement benefit. The Brief of the Appellee argues that Appellee does not seek to attach, levy, or seize Appellant's Veteran's Administration disability benefits as prohibited under 38 U.S.C. 3101(a).

The Brief of the *Amici Curiae* further argues that in recognizing the unique contribution of the military spouse to the uniformed services, Congress sought to expand protections afforded to former spouses of military personnel by enacting FUSFSPA. Additionally, the Brief of the *Amici Curiae* argues that the servicemember's unilateral waiver of a portion of the military retired pay does not defeat the other spouse's interest in the total retirement benefit.

The consent of the attorney for the Appellee in this case has been obtained; however, the attorney for the Appellant has refused consent to the filing of a brief by the above listed organizations as *Amici Curiae.*

For the reasons stated, Counsel for the *Amici Curiae* respectfully moves that the applicant organizations be granted leave to file the accompanying brief *Amicus Curiae* in this case.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE WOMEN'S EQUITY ACTION LEAGUE, THE NOW LEGAL DEFENSE AND EDUCATION FUND, *ET AL.* IN SUPPORT OF THE APPELLEE

INTEREST OF *AMICI CURIAE*

This brief *Amicus Curiae* is submitted pursuant to Rule 36.2 of the Rules of this Court by the Women's Equity Action League, the NOW Legal Defense and Education Fund, *et al.*,[1] and is filed in support of Appellee Gaye (Mansell) Forbes.

STATEMENT OF CASE

Amici accept and adopt by incorporation the statement of facts as set forth by Appellee in her brief.

SUMMARY OF ARGUMENT

Following this Court's decision in *McCarty v. McCarty*, 453 U.S. 210 (1981), Congress enacted the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA), Pub. L. No. 97-252, 97 Stat. 730 (1982). The legislative history of FUSFSPA indicates that Congress recognized the unique contributions of the military spouse to the marriage and to the uniformed services and sought to return to states the authority to treat military retirement pay as a marital asset upon divorce.

Because of an increasing trend at the state and federal levels to view marriage as an economic partnership, with each spouse contributing equally, an ex-spouse such as the Appellee, Gaye M. (Mansell) Forbes, is entitled to consideration of the total retirement benefit to calculate the division of marital assets upon the dissolution of the marriage. Consequently, the Appellant may not override the marital interest of his spouse by unilaterally waiving a portion of his retirement pay, transmuting a divisible marital asset into a nondivisible asset.

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[1] Jurisdictional statements of interest for *Amici* are set forth in an Appendix to this brief.

Finally, in light of the significant contributions made by military spouses to the marital partnership, thus limiting opportunities to pursue separate employment and accrue pensions, public policy requires the recognition of the total retirement benefit earned during marriage as a marital asset.

In conclusion, FUSFSPA should not be construed so narrowly as to impose severe economic hardship on the nonservicemember spouse who is acknowledged by Congress to have contributed equally under the rigors of the military marriage. Divorce should not relegate one spouse to poverty and net a windfall to the spouse who can unilaterally transmute assets.

ARGUMENT

I. BY ENACTING THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT, CONGRESS RECOGNIZED THE IMPORTANT CONTRIBUTIONS OF MILITARY SPOUSES AND INTENDED A LIBERAL INTERPRETATION OF STATE COURT AUTHORITY TO TREAT MILITARY RETIREMENT PAY AS A MARITAL ASSET UPON DIVORCE.

Most recently, in *Rose v. Rose*, 107 S.Ct. 2029 (1987), this Court affirmed traditional deference to state courts in matters of domestic relations. *Id.* at 2033. In *Rose*, the Court noted, "we have consistently recognized that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not the laws of the United States' ", citing *In re Burrus*, 136 U.S. 586, 593-94 (1890). In the same vein, the Court indicated in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) that the states "lay on the guiding hand" in marriage law questions. *Id.* at 581.

The standard under which federal law governing military retirement pay will preempt state community property decisions was last considered by this Court in *McCarty v. McCarty*, 453 U.S. 210 (1981), using the standard expressed in *Hisquierdo*, 439 U.S. at 581. *McCarty* applied a two-pronged approach: " '[t]he pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require non-recognition.' " 453 U.S. at 221 (quoting *Hisquierdo*, 439 U.S. at 583). State family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will be overridden. 453 U.S. at 220.

In *McCarty*, the Court held that the military retirement pay was a "personal entitlement" not subject to community property division. *Id.* at 232. In addition, the federal interest the Court found compelling was that accrual of military retirement pay exclusively to the servicemember was necessary in order to accomplish two major goals: "to provide for the retired servicemember, and to meet the personnel management needs of the active military forces." *Id.* at 232. In order to maintain a "youthful and vigorous" military force, the Court noted that "[t]he value of retired pay as an inducement for re-enlistment is obviously diminished to the extent that the service member recognizes that he or she may be involuntarily transferred to a state that will divide that pay upon divorce." *Id.* at 234. In addition, awarding a spouse a portion of the military retirement pay was viewed as discouraging retirement by reducing the retired pay available. *Id.* at 235. In deference to Congress' supremacy in military matters, such rationales were considered sufficient to constitute damage to clear and substantial federal interests.

Much has been written about the *McCarty* decision.[2] One legal scholar has characterized it as a "deviation" from precedent. *See* Koplow, *supra* note 2, at 88. In

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[2] See e.g., Koplow, *Division of Military Retirement Pay Upon Divorce*, 12 Baltimore L. Rev. 73 (1982); Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis, (Appendix)*, 33 UCLA L. Rev. 1250 (1986).

a dissent that foreshadowed the demise of *McCarty* by the subsequent passage of the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA), Pub. L. No. 97-252, 97 Stat. 730 (1982), then Associate Justice Rehnquist, joined by Justices Brennan and Stewart, studied the Court's five prior rulings in which it had found federal preemption of state domestic relations laws and concluded, "examination of the analysis in the Court's opinion convinces me that it is both unprecedented and wrong." 453 U.S. at 243. Justice Rehnquist was most critical of the Court's application of *Hisquierdo* in several respects. Not only did he feel that a more stringent test under *Hisquierdo* had been overlooked, he felt that preemption had been found by the majority on the basis of an *absence* rather than the presence of express statutory language to preempt state law in the military retirement statute. 453 U.S. at 237.[3]

Despite the *McCarty* Court's finding that California community property law regarding spousal interest in the military pension was preempted, the Court nonetheless did note, "[w]e recognize that the plight of an ex-spouse of a retired service member is often a serious one." 453 U.S. at 235. The Court concluded, however, that remedies for this concern were left to Congress alone. *Id.* at 236. Within months of this decision, a bill was introduced in Congress which clearly set out to correct the impact of the decision.[4] The Senate Report stated, "[t]he primary purpose of the bill is to remove the effect of the United States Supreme Court decision

[3] *Amici* assert that the more accurate standard articulated in *Hisquierdo*, noted in the *McCarty* dissent, 453 U.S. at 236, and applied in *Rose*, 107 S.Ct. at 2033 is: "On the rare occasion where state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment,' that state law be pre-empted." 439 U.S. at 581, quoting *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904).

[4] S. 1814 was introduced by Senator Roger Jepsen on November 4, 1981.

in *McCarty v. McCarty*, 453 U.S. 210 (1981). The bill would accomplish this objective by permitting Federal, State, and certain other courts, consistent with appropriate federal laws, to once again consider military retired pay when fixing the property rights between parties to a divorce." S. Rep. No. 502, 97th Cong., 2d Sess. 1 (1982).

The rationales underlying the Court's findings in *McCarty* were strongly controverted in the legislative record which accompanied the eventual passage of FUSFSPA and other similar legislation.[5] An examination of this evidence is pertinent for two reasons. First, where the language of the statute may be unclear, the legislative purpose and history strongly supports a broad interpretation of the statute's provisions to provide a military ex-spouse with increased rights to military pensions under applicable state law.[6] Anything less would fly in the face of Congress' express desire to recognize the contributions of those spouses and to amend the military retirement compensation system accordingly.

Secondly, the military policy concerns forwarded by the *McCarty* Court to be persuasive are again being raised by *Amici Curiae* on behalf of Appellant in the present case. (Brief of *Amici Curiae* for Retired Officers Association, *et al.* at 12-13). Yet these rationales were squarely rejected by Congress when passing the FUSFSPA. Con-

[5] *See generally*, H.R. Conf. Rep. No. 749, 97th Cong., 2d Sess. (1982); S. Rep. No. 502, 97th Cong., 2d Sess. (1982). *Hearing on HR 2817, HR 3677, and HR 6270: Legislation Related to Benefits for Former Spouse of a Military Retiree Before the Military Compensation Subcomm. of the Comm. on Armed Services, House of Representatives*, 96th Cong., 2d Sess. (1980). (Hereinafter *House Hearings*); *Federal Uniformed Services Former Spouses' Protection Act: Hearings before the Subcomm. on Manpower and Personnel of the Comm. on Armed Services, U.S. Senate, on S. 1453, S. 1648, S. 1814*, 97th Cong., 1st and 2d Sess. (1981-82) (hereinafter cited as *Senate Hearings*).

[6] R. Dickerson, *The Interpretation and Application of Statutes* (1975).

trary to the statement of *Amici Curiae* on behalf of Appellant, that "[t]his is not an issue about whether a former spouse is receiving an adequate level of support," (Brief of *Amici Curiae*, Retired Officers Association, *et al.* at 20), the economic impact of this case for hundreds of thousands of current and future divorced spouses *is* at issue and was precisely the center of concern in the passage of FUSFSPA.

In passing FUSFSPA, Congress weighed the concerns regarding our national defense that formed the basis of the *McCarty* decision and concluded that the stated fears of detriment to our nation's defense arising from the division of military pensions at divorce were unfounded. In reference to concerns regarding national defense, the House in passing FUSFSPA noted, "[t]he Department of Defense has not submitted any satisfactory empirical evidence to show that during the period prior to the *McCarty* decision, recruiting, retention, and personnel assignments were adversely affected by the application of State domestic relations law." 1215 Cong. Rec. H 4718 (daily ed. July 28, 1982); S. Rep. No. 502, 97th Cong., 2d Sess. 7 (1982); *See also McCarty*, 453 U.S. at 234 note 26 (taking note of a Presidential Commission report questioning the extent to which the military retirement system actually accomplishes these goals).

Examination of the legislative record and subsequent evidence strongly supports the position that recognizing and respecting the role of the military spouse as homemaker, mother, and companion actually serves to *enhance* our national defense.[7] In fact the attitude and support of one's spouse has been identified as the second most influential factor in a servicemember's decision to re-

[7] The Report noted, "[t]herefore the committee believes that the unique status of the military spouse and that spouse's great contribution to our defense require that the status of the military spouse be acknowledged, supported, and protected." (S. Rep. No. 502, 97th Cong., 2d Sess. at 6 (1987).

enlist and remain with the service, exceeded in importance only by pay and benefits.[8]

It is important to note that the introduction and final passage of FUSFSPA was not only a direct response to the *McCarty* decision but a product of similar legislation proposed earlier and several hearings over a period of time which educated the public and policymakers on a topic that had been, and to some degree remains, a little known issue outside the military community.[9] *McCarty*, stated one of the bill's sponsors, "merely made a bad situation worse" 1200 Cong. Rec. H 4717 (daily ed. July 28, 1982).

Several legal developments and social forces provided impetus to the legislation. The first was a substantial increase in the divorce rate. While the national divorce rate increased only slightly from 1860 to the early 1960s, it has increased rapidly in the last quarter century. Between 1963 and 1975, the rate doubled, increasing every year thereafter and peaking in 1981 when there were 1.21 million divorces. L. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* at xvii (1985). The divorce rate among military veterans is slightly higher than among their civilia counterparts. L. Long, *Military Families: Do They Differ From Their Civilian Counterparts* (1984) (Center for Demographic Studies, U.S. Bureau of the Census).

[8] Among enlisted personnel (1-6 years service), reenlistment probability increases 200 percent when the wife is very satisfied with military life. J. Griffith, T. LaVange, T. Gabel, Z. Doering, B. Mahoney, *Description of Spouses of Officers and Enlisted Personnel in the U.S. Armed Forces: 1985.* (November 1986) (Defense Manpower Data Center, Dep't of Defense, Arlington, VA). Family factors tie with duty and job factors as the second largest group of factors responsible for retention next to pay and benefits in the U.S. Army. Department of the Army, *Army Family Action Plan: Research and Evaluation Annual Report 1987* at 3 (1987) (U.S. Army Community and Family Support Center)

[9] *See* note 2 and authorities cited therein.

Other contributing developments included states' movement toward "no-fault" divorce [10] and the fact that alimony was rarely available and failed to provide an adequate substitute for the most important marital asset in a military marriage—the military pension.[11]

In 1891, when the military retirement system was initiated, the military community was strikingly different than it is today. The military has gone from primarily an environment of single males to one which is increasingly made up of men and women with families.[12] "Today there are more military family members than there are uniformed personnel, both single and married." [13] Military policy is constantly in need of revision in order to reflect changing social values and demographics. These must be weighed against important military objectives. However, as the record accompanying the legislation demonstrates, the military concerns cited by the Department of Defense were largely without real substance and were clearly subordinate to the plight of the military spouse. In fact, since FUSFSPA, the military has increasingly recognized that spousal support is a key component to servicemember retention and recruitment.[14]

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[10] *See L. Weitzman, The Divorce Revolution, supra,* at 15-51.

[11] In 1981, only 14.9 percent of divorced women received an alimony award, and the mean amount received was only $3,000. Bureau of the Census, U.S. Dep't of Commerce, *Child Support and Alimony: 1983,* Current Population Reports, Series P-23, No. 141, 4 (1985). *See also,* Testimony by National Military Wives Association and EX-POSE. *House Hearings, supra* at 23; *Senate Hearings, supra,* at 58, 61.

[12] As of 1979, 57.5 percent of enlisted personnel and 78.4 percent of officer personnel were married. Armed Services YMCA of the USA, *American Military Families: Basic Demographics,* 23 (September 1984).

[13] *Id.* at 41.

[14] Secretary of Defense, Frank C. Carlucci recently called military families "the most valuable resource in support of the national defense." Military Family Resource Center, *Military Family* (newsletter) 1 (February 1988).

One of the strongest points that emerged from testimony and evidence submitted during the passage of FUSFSPA was that law and public policy had contributed to creating an inequitable situation. Military wives who are subject to the added demands and stresses of military life were precluded from sharing the military pension at divorce, often resulting in severe poverty for the ex-spouse.[15]

According to testimony presented by Ex-Partners of Servicemen/Women for Equality (EX-POSE), whose membership grew from 10 individuals to 2,000 in less than one year after the *McCarty* decision, a member poll profiled the average ex-spouse as approximately 48 years old upon divorce, married 28 years (20 of them in the military) with two to three children, and an average income of $6,376.[16]

Marriage to a military servicemember requires either frequent relocation to remote and sometimes hazardous duty stations and/or separations for long periods of time where the spouse is responsible for fully maintaining the family and its home. Duty assignments away from home average twenty-five days annually in the U.S. Air Force.[17] Due to frequent duty assignments, fifteen to twenty percent of military fathers are not living with their families at any given time.[18] Because of this situation, the contributions of the military wife to the fam-

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[15] 1200 Cong. Rec. H 4718, 4720 (daily ed. July 28, 1982); *Senate Hearings, supra,* at 14, 65.

[16] *House Hearings, supra* at 75.

[17] D. Orther, *Families in Blue: A Study of Married and Single Parent Families in the U.S. Air Force* 43 (1980). (Family Research and Analysis, Inc.).

[18] Hunter and Pope, *Family Roles in Transition: In a Changing Military,* 11 (1981) (Family Research Center, United States International University, San Diego, CA).

ily, in the form of homemaking and parenting services, are extensive and indispensable.

The military family moves approximately every twelve to twenty-four months. However, the average number of moves for a marriage of approximately 20 years is 12.[19] This aspect of military life has a particularly devastating impact on the employment and educational attainment of military spouses and the ability of military spouses to accrue their own pensions, benefits, and occupational skills. According to testimony by the National Military Wives Association, military wives experience an unemployment rate more than twice that of their civilian counterparts, are more concentrated in clerical and service occupations, and earn substantially less overall.[20] One study shows that military wives at each age group are more likely to have had no earnings in 1979. L. Long, *supra*, at 8. Among those wives over the age of 29, military wives were less likely to contribute $10,000 or more to annual family income. *Id.* at 29. Military wives are more likely than civilian wives to have less education than their husbands. Such findings are tied to the frequent transfers required in military life. *Id.* at 26.

As recently as 1987, House testimony on the issue of military spouse employment revealed an especially relevant problem: military wives, especially officer wives, are under pressure *not* to take outside employment in order to support their husbands' careers.[21] Not only does

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[19] *House Hearings, supra,* at 74-75; *Senate Hearings, supra,* at 54. *See generally American Military Families: Basic Demographics, supra,* at 42.

[20] Study by Department of Defense showing military wives earning between $2,699-$5,649 per year in comparison to $4,117 to $6,610 for other civilian women. Department of Defense, *Report of the Pay Adequacy Study,* Table I (October 1979). *House Hearings, supra,* at 125.

[21] *Women in the Military: Hearings before House Armed Services Committee and Subcommittee on Military Personnel and Compensation,* Oct. 1, 1987, Nov. 19, 1987, February 4, 1988 (not yet printed). (Testimony by C. Becraft available from WEAL, Washington, D.C.). *See also* S. Gibbons, *Commanders' Wives,* Ladycom 51-65 (June 1984); J. Blucher, *The Right to Work,* Air Force Times 67 (August 3, 1987); and United States Air Force, *Spouse Issues: A Blue Ribbon Panel Report* (March 1988).

the military spouse have primary and often sole responsibility for the home and family, but is frequently called upon to support various volunteer activities which are essential to military life. Military spouses give countless hours to the Red Cross, thrift shops, civilian and military hospitals, and family support services.[22] In a publication called "The Sailor's Wife", distributed by the United States Navy, recruiters stated, "[y]our husband's job and the way you understand it and the way you help him do it to the best of his ability are important contributions to the Navy's strength. The United States Navy relies on that strength."[23] An important point raised in testimony by military wives was that a young wife weighing her future in service will question why so much is demanded of her when she has been denied an equitable stake in that pension should she experience divorce. *Senate Hearings, supra,* at 58. If the military wife feels that her contributions are not being adequately recognized or compensated, her dissatisfaction with the military can directly result in lower enlistment or reenlistment for the servicemember.[24] Senator Jepsen, a primary sponsor of FUSFSPA, stated, "A spouse who is guaranteed some form of security is much more likely to urge the member to remain in the military." *Senate Hearings, supra* at 12.

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[22] *See generally, Spouse Issues: supra. See also, Senate Hearings, supra,* at 55.

[23] *Senate Hearings, supra,* at 55.

[24] "The most important factor related to retention decisions among married men and women is spouse support for the Air Force career. Without it only 30 percent of men and 26 percent of women will still make a career commitment." D. Orther, *supra,* at 27.

Without in any way detracting from the sacrifice and heroism of our nation's armed service members, it is equally important to recognize the contributions and sacrifice on the part of our nation's military spouses. Testimony offered by the National Military Wives Association concluded:

> For the most part, they [military wives] believe their contributions to be significant and they feel pride in their families, their husbands' careers, and their country. They do not accept the idea that these contributions count for nothing in the social and economic partnership of marriage.[25]

As Congressman Whitehurst, a cosponsor of FUSFSPA, stated, division of military pensions at divorce "is an issue that strikes at the very heart of the traditional family concept, offering recognition and protection to those women willing to make the required sacrifices in support of a husband's military career." 1230 Cong. Rec. 4723 (daily ed. July 28, 1982).

II. THE STRONG MANDATE IN STATE AND FEDERAL LAW THAT PENSIONS BE RECOGNIZED AS A MARITAL ASSET DICTATES THAT ONE SPOUSE'S UNILATERAL DECISION TO WAIVE A PORTION OF MILITARY RETIREMENT PAY IN ORDER TO RECEIVE AN EQUIVALENT AMOUNT OF DISABILITY PAY DOES NOT DEFEAT THE OTHER SPOUSE'S COMMUNITY PROPERTY INTEREST IN THE TOTAL RETIREMENT BENEFITS.

A. State and Federal Law Have Increasingly Recognized the Need to Include Pension Rights Earned During Marriage as a Marital Asset at Divorce.

The passage of FUSFSPA was part of a sweeping trend in both state and federal law toward the inclusion of retirement benefits among marital assets at divorce. This trend, in turn, grew out of two underlying shifts in American law: the increasing recognition of marriage

[25] *Senate Hearings, supra,* at 58.

as an economic partnership and the growing awareness of pension benefits as valuable property necessary to a couple's financial security.

The laws of each state regarding division of property upon divorce are grounded on one of two basic legal systems, community property and common-law property. In the eight community property states, including California, each spouse has an immediate one-half interest in all property that is earned by either spouse during the marriage or is acquired jointly by them by gift. *Hisquierdo*, 439 U.S. at 578, 592-93 (Stewart, J., dissenting). Property acquired before the marriage, or acquired separately by one spouse during the marriage by gift, is the separate property of the acquiring spouse. By contrast, under the common-law property system, the ownership of property has traditionally been dictated by which spouse holds title.[26] *Id* at 578. *See generally* H. Clark, *The Law of Domestic Relations in the United States* at 590-91 (2d ed. 1988).

Today, in both community property and common-law states, there is widespread acceptance of the view that marriage is a partnership of equals.[27] This principle

[26] To denote property subject to distribution at divorce, community property states generally use the term "community property" and common-law states generally use the term "marital property." *See* Blumberg *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation and Other Wage Substitutes: An Insurance or Replacement, Analysis,* 33 UCLA L. Rev. 1250, 1253 note 10 (1986). For the sake of simplicity, *Amici Curiae* herein use the term "marital assets" when the discussion encompasses the treatment of both community property and marital property at divorce.

[27] *See generally* Foster and Freed, *Marital Property Reform in New York: Partnership of Co-Equals?,* 8 Fam. L.Q. 169, 176 (1974); Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri,* 41 Mo. L. Rev. 165 (1976); Krauskopf and Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support,* 35 Ohio St. L.J. 558 (1974); Laughrey, *Uniform Marital Property Act: A Renewed Commitment to the American Family,* 65 Neb. L. Rev. 120 (1986); Prager, *Sharing*

has a long history in the community property states. *Hisquierdo*, 439 U.S. at 592-94 (Stewart, J., dissenting). The concept is newer in common-law states.[28] During the past two decades, divorce reform has swept the common-law states with the result that all of them now permit equitable distribution of property at divorce regardless of which spouse holds title.[29] Divorce reform under the common-law regime was based largely on the legal model already prevailing in the community property states.[30] Equitable distribution in the common-law states reflects the recognition that husbands and wives are investing in a shared marital enterprise and are therefore both entitled to benefit from the gains that the enterprise achieves. For example, the New York Court of Appeals recently stated that "[e]quitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker." *Price v. Price*, 69 N.Y.2d 8, 14, 511 N.Y.S.2d 219, 222, 503 N.E.2d 684, 687 (1986) (citations and emphasis omitted).

According to the marital partnership principle now universally accepted in American law, the married couple forms an economic unit. The contributions of both husband and wife to this unit are valuable regardless of whether the contributions take financial or non-financial form. Therefore, retirement benefits earned

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Principles and the Future of Marital Property Law, 25 UCLA L. Rev. 1 (1977).

[28] The historical basis for the common-law system is epitomized by Blackstone's famous formulation that "the husband and wife are one person in law" and that the woman's legal existence is merged into the man's at marriage. 1 W. Blackstone, *Commentaries on the Laws of England* at 441-45 (1809).

[29] Freed and Walker, *Family Law in the Fifty States: An Overview*, 21 Fam. L.Q. 417, 453-54 (1988) (categorizing Mississippi as a title state but acknowledging case law to the contrary).

[30] Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri, supra*, at 166.

during marriage must be deemed to be the result of the combined efforts of husband and wife. To label one spouse as the "worker" entitled to reap the benefits of the pension, and the other as the "non-worker" who has no claim to the pension rights, would be to deny the fundamental principle of marriage as an economic partnership. *See Steinke v. Steinke*, 126 Wis. 2d 372, 376 N.W.2d 839, 833-44 (1985), *reh'g denied*, 127 Wis. 2d 444, 379 N.W.2d 853 (1986). Because of the extraordinary sacrifices and contributions made by military spouses, the need to recognize the "marital partnership" principle at divorce is especially compelling. *See* Section I, *supra*.

The overwhelming trend in state law throughout the country is now to include all retirement benefits when dividing the marital assets at divorce.[31] This trend is evident in the numerous cases decided in both community property and common-law states.[32]

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[31] Freed and Walker, *Family Law in the Fifty States: An Overview*, *supra* note 29, at 426-29, 489-95 (1988); Meyer, *Vested But Unmatured Pensions as Marital Property: Inherent Valuation, Allocation, and Distribution Problems in Equitable Distributions*, 14 Rutgers L.J. 175, 176 n.3 (1982).

[32] *E.g.*, *Chase v. Chase*, 662 P.2d 944 (Alaska 1983); *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977); *Askins v. Askins*, 288 Ark. 333, 704 S.W.2d 632 (1986); *In re Marriage of Fithian*, 10 Cal.3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974) (en banc) *cert. denied*, 419 U.S. 825 (1974); *In re Marriage of Gallo*, 752 P.2d 47 (Colo. 1988); *Smith v. Smith*, 458 A.2d 711 (del. Fam. Ct. 1983); *Pastore v. Pastore*, 497 So.2d 635 (Fla. 1986); *Linson v. Linson*, 1 Hawaii App. 272, 618 P.2d 748 (1980); *Griggs v. Griggs*, 107 Idaho 123, 686 P.2d 68 (1984); *In re Marriage of Musser*, 70 Ill. App. 3d 706, 388 N.E.2d 1289 (1979); *Arthur v. Arthur*, 519 N.E.2d 230 (Ind. Ct. App. 1988) (statute permitting division of military pension applies prospectively only); *In re Marriage of Schissel*, 292 N.W.2d 421 (Iowa 1980); *Poe v. Poe*, 711 S.W.2d 849 (Ky. Ct. App. 1986); *Stevens v. Stevens*, 476 So.2d 883 (La. Ct. App. 1985); *Lunt v. Lunt*, 522 A.2d 1317 (Me. 1987); *Nisos v. Nisos*, 60 Md. App. 368, 483 A.2d 155, *lv. denied*, 403 Mich. 844 (1978), *cert. denied*, 442 U.S. 940 (1979), *reh'g denied*, 444 U.S.

The treatment of retirement benefits as a marital asset at divorce also recognizes that a pension interest is property. The traditional view that pension rights were a "meer expectancy" until payments were actually received has been replaced by the prevailing modern view that such interests are a "chose in action" and therefore property. Meyer, *supra*, at 178. *In re Marriage of Brown*, 15 Cal.3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976) (*en banc*) is the leading case articulating the modern view that pension rights, even if unvested, are contract rights and therefore are property. *Brown* has been widely followed on this point. H. Clark, *supra*, at 613. Accordingly, even when pensions are unvested or unma-

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887 (1980); *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984); *Powers v. Powers*, 465 So.2d 1036 (Miss. 1985); *Coates v. Coates*, 650 S.W.2d 307 (Mo. Ct. App. 1983); *In re Marriage of Kecskes*, 210 Mont. 479, 683 P.2d 478 (1984); *Taylor v. Taylor*, 217 Neb. 409, 348 N.W.2d 887 (1984); *Burton v. Burton*, 99 Neb. 698, 699 P.2d 703 (1983); *Whitfield v. Whitfield*, 222 N.J. Super. 36, 535 A.2d 986 (App. Div. 1987); *Berry v. Meadows*, 103 N.M. 761, 713 P.2d 1017 (Ct. App. 1986); *Lewis v. Lewis*, 83 N.C. App. 438, 350 S.E.2d 587 (1987); *Delorey v. Delorey*, 357 N.W.2d 488 (N.D. 1984); *Alexander v. Alexander*, 20 Ohio App. 3d 94, 484 N.E.2d 1068 (1988); *Stokes v. Stokes*, 738 P.2d 1346 (Okla. 1987); *Wood & Wood*, 66 Or. App. 941, 676 P.2d 338 (1984); *Major v. Major*, 359 Pa. Super. 344, 518 A.2d 1267 (1986); *Cearley v. Cearley*, 544 S.W.2d 277 (1985); *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355 (1975); *Butcher v. Butcher*, 357 S.E.2d 226 (W. Va. 1987); *Thorpe v. Thorpe*, 123 Wis. 2d 424, 367 N.W.2d 233 (1985). *See also* N.H. Rev. Stat. Ann. 458:16-a (1987 Supp.) (property includes vested or non-vested pensions and other retirement benefits).

A small number of jurisdictions do not permit military pensions to be divided at divorce but allow the pension to be considered when dividing other property and/or when awarding alimony. *See Tinsley v. Tinsley*, 431 So.2d 1304 (Ala. Civ. App. 1983); *Grant v. Grant*, 9 Kan. App. 2d 671, 685 P.2d 327 (1984); *Brown v. Brown*, 279 S.C. 116, 302 S.E.2d 860 (1983). These holdings run counter to the overwhelming majority trend. *See* Freed and Walker, *Family Law in the Fifty States: An Overview*, 20 Fam. L.Q. 439, 446 (1987); Freed and Walker, *Family Law in the Fifty States: An Overview*, 19 Fam. L.Q. 331, 336 (1986).

tured,[33] the dominant majority rule among the states that have addressed the issue is that pensions, including military pensions, are property subject to division at divorce.[34]

One rationale frequently relied upon to support the conclusion that pensions are property is that pensions take the place of wages. State courts have repeatedly held that pension benefits are a form of deferred compensation. This principle has been applied to military[35] as well as civilian[36] pensions.[37]

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[33] According to the standard definition, *vested* pensions are those which survive the discharge or voluntary termination of the employee's employment, while *matured* pensions are those as to which the employee has an unconditional right to immediate payment. H. Clark, *supra*, at 612.

[34] *See e.g., Whitfield v. Whitfield*, 222 N.J. Super. 36, 535 A.2d 986, 995 (App. Div. 1987) (citing cases); Meyer, *supra*, at 175-76 n.2 (citing cases).

[35] E.g., *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214, 215-16 (1977); *In re Marriage of Fithian*, 10 Cal.3d 592, 517 P.2d 449, 456-7, 111 Cal. Rptr. 369, *cert. denied*, 419 U.S. 825 (1974); *In re Marriage of Gallo*, 752 P.2d 47, 52 (Colo. 1988); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53, 56 (1975); *In re Marriage of Musser*, 70 Ill. App. 3d 706, 388 N.E.2d 1289, 1291 (1979); *Poe v. Poe*, 711 S.W.2d 849, 855 (Ky. Ct. App. 1986); *In re Marriage of Miller*, 187 Mont. 286, 609 P.2d 1185, 1186-87 (1980), *vacated and remanded for further consideration in light of McCarty v. McCarty*, 453 U.S. 918 (1981); *Kruger v. Kruger*, 73 N.J. 464, 375 A.2d 659, 662 (1977); *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755, 756 (1969); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355, 1358 (1975) (*en banc*).

[36] *E.g., In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 565, 126 Cal. Rptr. 633 (1976); *Barbour v. Barbour*, 464 A.2d 915, 920 (D.C. 1983); *Shill v. Shill*, 100 Idaho 433, 599 P.2d 1004, 1007 (1979); *Deering v. Deering*, 292 Md. 115, 437 A.2d 883, 887 (1981); *Kuchta v. Kuchta*, 636 S.W.2d 633, 665 (Mo. 1982) (en banc); *Kikkert v. Kikkert*, 177 N.J. Super. 471, 427 A.2d 76, 79 (App. Div.), *aff'd*, 88 N.J. 4, 438 A.2d 317 (1981) (*per curiam*); *Reed v. Reed*, 93 A.D.2d 105, 462 N.Y.S. 2d 73, 77, *appeal dismissed*, 59 N.Y.2d 761 (1983); *Braderman v. Braderman*, 339 Pa. Super. 185, 488 A.2d 613, 618 (1985).

[37] The argument that military retirement pay is only compensation for present and future services, and does not include deferred

In comparison to all other property acquired during marriage, pensions have become an increasingly important source of economic security and are often the single most valuable asset acquired by a couple.[38] This is particularly true among military families. Horkovich, *Uniformed Services Former Spouses' Protection Act: Congress' Answer to McCarty v. McCarty Goes Beyond the Fundamental Question*, 23 A.F. L.Rev. 287, 308 (1982-83). Where economic circumstances prevent a husband and wife from saving a substantial portion of income, the pension swells in importance as retirement approaches. *Deering v. Deering*, 487 A. 2d at 887.

Just as both spouses contribute to the earning of pension rights, both spouses justifiably expect to share the future enjoyment of this valuable benefit. *See Barbour v. Barbour*, 464 A. 2d at 920; *Kuchta v. Kuchta*, 636 S.W.2d at 664-65; *Kikkert v. Kikkert*, 177 N.J. Super. 471, 427 A. 2d 76, 79 (App. Div.), *aff'd*, 88 N.J. 4, 438 R. 2d 317 (1981).

> The important expectations attached to this asset by both husband and wife cannot be overstated. They involve, after all, the fundamental belief by both spouses that their mutual security in later years will be protected by pension benefits. They also involve an assumption of interdependence and wealth sharing that has almost certainly been held jointly by both husband and wife during their years of marriage. Bonavich, *Allocation of Private Pension Benefits as Property in Illinois Divorce Proceedings*, 29 De Paul L. Rev. 1, 16 (1979).

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compensation for previous services, was discussed but explicitly not adopted by this Court in *McCarty v. McCarty*, 453 U.S. at 221-240.

[38] *See, e.g., In re Marriage of Brown*, 544 P.2d at 566; *Barbour v. Barbour*, 464 A.2d 920; *Kuchta v. Kuchta*, 636 S.W.2d at 664; L. Golden, *Equitable Distribution of Property* § 6.01 at 150 (1983); Krauskopf, *Marital Property At Marriage Dissolution*, 43 Mo. L. Rev. 157, 171 (1978).

State courts have increasingly recognized that division of a couple's assets at divorce should not ignore the needs of the nonemployee spouse upon reaching retirement age. *See e.g., Marriage of Cromwell*, 180 Mont. 40, 588 P.2d 1010, 1013 (1979); *Wilson v. Wilson*, 10 Or. App. 162, 449 P.2d 828, 828-29 (1972).

When the federal government has addressed the treatment of pensions at divorce, the outcome has strongly confirmed the state courts' view that retirement benefits are marital assets. Not once has Congress deemed federal interests compelling enough to interfere with the operation of state law to divide pensions at divorce.[39] Instead, each time it has spoken on the matter, Congress has demonstrated an unmistakable deference to state law on the treatment of pensions as marital assets. This pattern can be seen in Congressional enactments regarding retirement funds administered by federal agencies on behalf of a variety of government employees.

One of the first pension schemes to undergo reform was the Civil Service Retirement System (CSRS), the pension plan for civilian employees of the federal government. In 1978, Congress began by requiring the Office of Personnel Management, which administers the CSRS, to make payments to spouses as required under "the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court approved property settlement agreement." Civil Service Retirement Spouse Equity Act, Pub. L. No. 95-366 § 2, 92 Stat. 600, 5 U.S.C. § 8345(j)(i) (1982).[40] In 1979,

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[39] Decisions of this Court to the contrary have been superseded by Congressional enactment. *See* discussion *infra*.

[40] In 1984, dependent spouses' interests in survivors' benefits were strengthened under the Civil Service Retirement Spouse Equity Act, Pub. L. No. 98-615, 98 Stat. 3195 (1984), 5 U.S.C. § 8331 (1984). The Office of Personnel Management is now required to comply with state orders providing a survivor's benefit to dependent spouses. 5 U.S.C. § 8345(j)(1) (1984).

President Carter began requiring the Foreign Service Retirement and Disability System (FSRDS) to honor state court domestic relations orders calling for payments to divorced spouses of foreign service officers, who until then had sole rights to pension payments from the system. Executive Order 12,145, 44 Fed. Reg. 42,653 (July 18, 1979).[41]

Reforms of the Central Intelligence Agency Retirement and Disability System (CIARDS) followed a similar pattern.[42] In 1981, another pension scheme falling under the federal ambit, the Railroad Retirement Act (RRA), Pub. L. No. 97-35, Title II, Subtitle D, 45 U.S.C. § 231-231u (1981), also underwent reform. Congress amended the RRA to include divorced spouses as covered dependents, eligible to receive spousal benefits if certain requirements were met. Pub. L. No. 97-35, § 1129(a), 95 Stat. 641, 45 U.S.C. § 231a(c)(4) (1981).[43]

Similarly, after the Court decided the *McCarty* case, Congress responded swiftly and decisively with passage of FUSFSPA. *See* Section I, *supra*. Thus, in federal

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[41] *See also* Foreign Service Act, 22 U.S.C. § 1065(a) (*repealed*). The Foreign Service Act of 1980, Pub. L. No. 96-465, 94 Stat. 2071, 2159, 22 U.S.C. § 4041 et seq., created a statutory entitlement for the spouse of up to 50 percent. Pub. L. No. 96-465 § 814, 94 Stat. 2071, ——, 22 U.S.C. § 4044(a)(10) (1980).

[42] Congress amended the Central Intelligence Agency Spouses' Retirement Equity Act of 1982, Pub. L. No. 97-269 § 606, 96 Stat. 1148, 50 U.S.C. § 403, Title II, § 221 (1982), to give former spouses a right to a proportional share of up to one-half of a lump-sum pension payment, or to a deferred annuity beginning at age 62. State courts were given jurisdiction to determine the precise amount of the former spouse's share.

[43] A right to survivors' benefits for divorced spouses, and language clarifying that specific portions of RRA annuities are subject to division under state law at divorce, have been in existence since 1983. Pub. L. No. 98-76, § 405(a), 419; 97 Stat. 435, 438; 45 U.S.C. § 231c(e), 231m (1983).

law, as in state law, the consistent trend is toward broadening the recognition of pensions as marital assets at divorce.

B. A Servicemember's Choice Of The Disability-Pay Option For Receiving Retirement Benefits Does Not Preclude The Member's Former Spouse From Receiving An Equitable Share Of The Full Pension.

Given the strong recognition in state and federal law of the importance of treating pensions as a marital asset, *See* Section IIA *supra*, the unilateral decision of a servicemember such as Appellant to waive some or all of his military retired pay must not be allowed to defeat the other spouse's marital interest in the full amount of retired pay to which the servicemember is entitled. This conclusion is especially inescapable because the servicemember waiving the retirement pay receives an equal or greater financial benefit from the disability pay received in its place. Retired servicemembers opting for disability pay give up their pension benefits in name only. To allow servicemembers to transmute all or part of a divisible marital asset into a separate, nondivisible asset by a mere trick of bureaucratic legerdemain would make a mockery of both community property principles and common-law equitable distribution principles. In addition, excluding all or part of military retirement benefits from the pool of marital assets would gravely disadvantage the nonservicemember spouses by depriving them of retirement income toward which they have contributed and on which they have relied.

This case does not call upon the Court to reach the issue of whether military disability pay may be treated as a marital asset and divided at divorce. Appellee does not seek to claim a community property interest in her former husband's disability benefits. She claims only a right to her *full* community property interest in his gross retired pay, and argues that Appellant's voluntary decision to "trade" some of the retired pay for disability

benefits does not defeat her community property interest. The issue of how Appellee will enforce her interest is not before this Court; she does not argue that she may do so by garnishing or in any way attaching her former husband's disability payments. *See* Appellee's Brief on the Merits.

Several courts in community property states have not allowed receipt of disability benefits, particularly those taken in lieu of community-property pension benefits, to defeat a spouse's interest in the full pension.[44] Otherwise, the employee-spouse has an incentive to choose the disability pension and then to argue, as Appellant does here, that the disability portion is his or her separate property. *See Casas v. Thompson*, 42 Cal. 3d 131, 720 P.2d 921, 928, 228 Cal. Rptr. 33 (1986) (*en banc*). This result is inequitable and inconsistent with community property principles. *In re Marriage of Stenquist*, 21 Cal. 3d 779, 582 P.2d 96, 98, 148 Cal. Rptr. 9 (1978) (*en banc*). State courts have generally refused to permit this outcome because they recognize that this form of disability pay —like the pension for which it substitutes— is, in reality, the fruit of the marital community's effort.

Other, non-community property states have taken the same view.[45]

As the discussion in Section I demonstrates, there is no evidence that in enacting FUSFSPA, Congress intended

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[44] *Villasenor v. Villasenor*, 134 Ariz. 476, 657 P.2d 889 (Ariz. Ct. App. 1982); *In re Marriage of Stenquist*, 21 Cal.3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978); *Campbell v. Campbell*, 474 So.2d 1339 (La. Ct. App.), *writ denied*, 478 So.2d 148 (La. 1987); *Dominey v. Dominey*, 481 S.W.2d 473 (Tex. Civ. App.), *cert. denied*, 409 U.S. 1028 (1972); *In re Marriage of Kittleson*, 21 Wash. App. 344, 585 P.2d 167 (1978).

[45] *Lookingbill v. Lookingbill*, 301 Md. 283, 483 A.2d 1 (1984); *Karr v. Karr*, 628 P.2d 267 (Mont. 1981), *cert. denied*, 455 U.S. 1016 (1982); *Kruger v. Kruger*, 73 N.J. 464, 375 A.2d 659 (1977); *Newell v. Newell*, 121 Misc.2d 586, 468 N.Y.S.2d 814 (Sup. Ct. 1983). *See also In re Marriage of Goodding*, 677 S.W.2d 332 (Mo. Ct. App. 1984).

to interfere with the states' application of their own marital property law to the full amount where military disability pay is elected in lieu of retired pay.[46]

III. IN VIEW OF THE CONTINUING DISPARATE ECONOMIC CONSEQUENCES OF DIVORCE ON MILITARY WIVES, STRONG PUBLIC POLICY REQUIRES THE RECOGNITION THAT GROSS RETIREMENT BENEFITS EARNED DURING THE MARRIAGE ARE A MARITAL ASSET.

Women are the majority of spouses of servicemembers.[47] In addition, women constitute the majority of economically dependent spouses and are therefore more likely than men to be dependent upon the terms of a court's property division for their economic security after divorce. *See generally* L. Weitzman, *The Divorce Revolution*, *supra*. Thus, women would be disproportionately harmed by a rule allowing a servicemember's election of disability pay to prevent state courts from considering gross military retirement benefits earned during marriage as a marital asset. Such a rule fails to take into account the valuable contributions made by a nonservicemember spouse to the servicemember's acquisition of career benefits. It also ignores the fact that wives who contribute to their husbands' careers lose the chance to establish their own financial self-sufficiency and therefore run the risk of impoverishment after divorce.

As discussed in Section I, *supra*, military marriages such as the Mansells' twenty-three year marriage are characterized by the wife's performance of extraordi-

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[46] *See generally* Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis*, 33 UCI A L. Rev. 1250, 1299-1308 (1986).

[47] 89.8 percent of military personnel are men, and 53 percent are married. Department of Defense, *Selected Manpower Statistics, FY 1987* (1988) (Directorate for Information Operations and Reports).

nary duties to facilitate her husband's military career. A woman who spends time and energy enhancing her husband's military career loses opportunities to increase her own earnings, pension rights, and other benefits that come with employment. By investing their joint marital resources primarily in the husband's career rather than the wife's, such couples create a growing disparity in the earning potential of the two spouses. The unequal allocation of roles and responsibilities between husband and wife, which is epitomized by military marriages, poses a potentially grave injustice should the marital partnership end. At that point, the partner who has subordinated her career to that of her spouse is placed in a perilous position, because her role which served the ongoing family so well does *not* serve well an individual who must live alone after divorce.

The unequal division of roles within marriage, and the failure of courts to compensate for this financially at the time of divorce, is a direct cause of the striking disparity in standards of living between men and women after divorce. A recent California study found that a year after divorce, men's standard of living rose by 42 percent, while women's standard of living dropped by 73 percent. L. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181, 1251 (1981).[48] The past decade has seen a shocking rise in poverty among American women. D. Pearce and H. McAdoo, *Women and Children: Alone and in Poverty* (1981); L. Weitzman, *The Divorce Revolution, supra*, at 351.

In order to compensate women for their contributions to their husbands' careers, and to help prevent female

[48] *See also* Alaska Women's Commission, *Family Equity at Issue: A Study of the Economic Consequences of Divorce on Women and Children* (October 1987); Hoffman and Holmes, *Husbands, Wives and Divorce in Five Thousand American Families—Patterns of Economic Progress*, Vol. IV 27-31 (1976).

poverty after divorce, it is essential that the category of marital assets be defined broadly. Most couples have little in the way of conventional property (such as real estate, automobiles, investments and savings, etc.) at the time of divorce. L. Weitzman, *The Economics of Divorce, supra*, at 1188-1221. This is particularly true for military families who move frequently and typically lack the equity provided by home ownership. *See* 8 n.11. In most American marriages, the most valuable possession of the couple is the husband's career, including its earnings, fringe benefits, and especially its pension. L. Weitzman, *The Economics of Divorce, supra*, at 1188-1221. Benefits of employment have displaced more traditional types of property as the main source of financial security. *See generally* Glendon, *The New Family and the New Property*, 53 Tul. L. Rev. 697 (1979).

Dividing a servicemember's gross retirement interest that was earned during the marriage is absolutely essential to protecting the rights of the nonservicemember—usually the wife—at divorce. As the following discussion will show, no other reliable source of financial security is available to help women such as Gaye (Mansell) Forbes make up for the loss of such a substantial marital asset.

Pension benefits remain a major source of income for retired people and are "usually necessary to maintain an adequate standard of living in old age." U.S. Dep't of Labor, *Women and Private Pension Plans*, at ii (1980). However, women are unlikely to acquire separate pension benefits for themselves. *See generally* President's Commission on Pension Policy, *Working Papers: Working Women, Marriage and Retirement* at 29-41 (1980) (hereinafter cited as *Working Papers*). Partly as a result of pervasive discrimination resulting in occupational segregation, and partly as a result of the failure of the law and employers to reform pension coverage to take appropriate account of women's family responsibilities, women are half as likely as men to be employed in posi-

tions covered by private pension plans. When women are fortunate enough to be covered, they receive benefits that are about half the level of benefits received by male retirees.[49]

Homemakers do not have any access to pension coverage on their own and are therefore particularly vulnerable at divorce. Since work done within the home traditionally has not been viewed as having economic value, pensions have not been available for homemakers in their own right.[50] *See* U.S. Dep't of Justice, *The Pension Game: The American Pension System from the Viewpoint of the Average Women* at 4-6 (1979). Thus, military wives who must relocate frequently are unable to work long enough at any job for pension rights to vest.[51] *See* Section I, *supra*. In an attempt to accommodate their domestic responsibilities or because they cannot find full-time employment, many women hold paid positions only part-time.[52] Although federal law requires tax-qualified pension plans to cover employees who work at least 1000 hours annually, Retirement Equity Act, 29 U.S.C. §1053

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[49] *See* President's Commission on Pension Policy, *An Interim Report* at 7 (1980); a 1978 California study found that at the time of divorce only 11 percent of women had pension rights, compared to 24 percent of men. L. Weitzman, *The Economics of Divorce, supra*, at 1198.

[50] The Individual Retirement Account allows eligible employed spouses to establish either separate or joint accounts for the non-employee spouse. 26 U.S.C. §§ 219(c) (1988). However, this provides only limited protection for the homemaker.

[51] Under the recent federal income tax reform legislation, non-military pensions must vest after not more than five years with the same employer. Tax Reform Act of 1986, Pub. L. No. 99-514 §§ 1113 (codified at 26 U.S.C. §§ 411(a)(2) (1988)). Prior law set the vesting requirement at ten years. 26 U.S.C. §§ 441(a)(2) (1986).

[52] *Working Papers, supra*, at 36. Approximately one-third of all employed married women with children have part-time positions. Bureau of Labor Statistics, U.S. Dep't of Labor, *Half of Mothers With Children Under 3 Now in Labor Force*, U.S.D.L. 86-345 at Table 3 (August 20, 1986) (news release).

(b)(2)(A) (1988), many women in part-time employment cannot adequately care for their families if they work the 20 hours a week called for by this minimum requirement; thus, they are excluded from pension plans. Women's inadequate access to pensions contributes to the precarious financial position of many of the elderly female citizens of this nation.[53] The labor force opportunities for divorced women are inadequate to ensure their financial self-sufficiency. The majority of women in the paid work force are concentrated in traditionally female occupations with low pay and little opportunity for advancement.[54] As recently as 1986, women working year-round full time still earned a median income of $16,230, only 64 percent of the $25,260 earned by men working year-round full time. *Money, Income and Poverty Status, supra*, at 2. Even when women and men are in the same occupation, women earn less.[55]

Older women forced into the labor market by divorce after a long marriage are at a particular disadvantage. Many have been homemakers for two or three decades or longer and have no marketable job skills. Many such women are unable to find jobs at all. Hauserman, *Home-*

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[53] In 1986, the median income from all sources for persons over the age 65 was $11,544 for men and $6,425 for women. Bureau of the Census, U.S. Dep't of Commerce, *Money Income and Poverty Status of Families and Persons in the United States: 1986*. Current Population Reports, Series P-60, No. 157 (1987) (hereinafter cited as *Money Income and Poverty Status*). The proverty level for a single person is $5,770. Fed. Reg. 4213-14 (Feb. 12, 1988).

[54] More than half of all women are clerical/administrative support workers (80 percent women) and retail and personal services sales workers (69 percent women). Women's Bureau, U.S. Dep't of Labor, *20 Facts on Women Workers*, Fact Sheet No. 86-1 (1986).

[55] In 1987 men in service occupations had median weekly wages of $306, while women in service occupations earned $197 per week. Bureau of Labor Statistics, U.S. Dep't of Labor, *Usual Weekly Earnings of Wage and Salary Workers: Second Quarter 1987*, U.S.D.L. 87-327 at Table 3 (July 30, 1987) (news release).

makers and Divorce: Problems of the Invisible Occupation, 17 Fam. L. Q. 41, 58-59 (1983); Older Women's League, *The Disillusionment of Divorce for Older Women*, Gray Paper No. 6, (1980). Alimony still does not provide any reasonable protection from impoverishment for divorced women.[56] In the case at bar, Gaye (Mansell) Forbes waived her right to alimony as part of the settlement providing for her to receive half of Appellant's gross retirement pay. (J.S. App. A. 2).

Many divorced women may be forced to rely upon Social Security benefits for financial support. Unfortunately, examination of the Social Security system shows that such reliance is misplaced. Divorced women who have worked within the home for all or most of their married lives are eligible to receive Social Security benefits only if their marriage lasted at least ten years. 42 U.S.C. § 402(b) (1) (G) (1988).[57]

Women who are currently employed in the paid labor force, and who are therefore potentially eligible for Social Security in their own right, fare little better.[58] Be-

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[56] National statistics reveal that fewer than 15 percent of divorced women have an award or agreement to receive alimony; that the average annual amount received is only $3,730; and that over a quarter of women supposed to receive alimony receive no payments at all. Bureau of the Census, U.S. Dep't of Commerce, *Child Support and Alimony: 1985*, Current Population Reports, Series P-23, No. 152 at 6 (1987).

[57] If a woman is eligible, the most she can receive while her former husband is alive is an amount equal to half of his benefits, while he receives the full amount. 42 U.S.C. §402(b)(2) (1988). The wife's share is rarely sufficient for survival. *See Working Papers, supra*, at 6; U.S. Dep't of Health, Education and Welfare, *Social Security and the Changing Roles of Men and Women*, 23-24 (1978).

[58] In August 1985, the average monthly benefit for retired workers was $521 for men and $399 for women. Social Security Administration, U.S. Dep't of Health and Human Services, *Monthly Benefit Statistics* (August 1985).

cause of a combination of complex factors, many employed women may actually be better off by forfeiting their own Social Security contributions and relying on receipt of dependent spouse benefits. *See* 42 U.S.C. §402 (q) (1988).

For those divorced women who are reduced to poverty, reliance on public assistance may be necessary. Women constitute the vast majority of adults receiving income from these sources. *See* U.S. Commission on Civil Rights, *Women Still in Poverty*, 1 (1979). The poverty rate for female-headed single-parent households is over three times the rate for all families and nearly six times the rate for married couples. *Money Income and Poverty Status, supra*, at 23, table 15. Funds provided by assistance programs such as Aid to Families with Dependent Children and Supplemental Security Income are grossly inadequate for financial support.[59]

Therefore, women's access to pension rights is crucial since employment, alimony, Social Security, and public assistance all fail to provide any reasonable assurance of financial support for divorced women. An adequate property division is the linchpin of a woman's financial survival after divorce. Depriving the wife in this case of the right to share in the gross value of a pension which she helped acquire through her marital contributions would provide the husband with a windfall, while relegating the wife to a future of financial hardship.

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[59] The average monthly AFDC payment for a California family in 1984 was only $489 per month, and the average monthly federal Supplemental Security Income benefit for an aged recipient in California in 1985 was only $254 per month. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States: 1987* at 365, table 622 (1986).

CONCLUSION

For all of the above reasons, this Court is respectfully requested to affirm the holding of the California Court of Appeal below.

Respectfully submitted,

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[oo] Recognition is hereby extended to Myra Sun, Esq., Donna Edwards, Dale Azaria and Mary Wright for their valuable assistance on this brief.

APPENDIX

DESCRIPTION OF AMICI ORGANIZATIONS

AMERICAN ASSOCIATION OF RETIRED PERSONS

The American Association of Retired Persons (AARP) is a not-for-profit membership corporation of more than 29 million persons age fifty and older. AARP is the largest organized group of older Americans in the country. In representing the interests of its members, AARP seeks to: enhance the quality of life for older persons; lead in determining the role and place of older persons in society; sponsor research on physical, psychological, social, economic and other aspects of aging; and represent and help protect the economic interests of older persons, including those of older women.

EX-PARTNERS OF SERVICEMEN/WOMEN FOR EQUALITY

Ex-Partners of Servicemen/women for Equality (EX-POSE) is a non-profit organization with local chapters throughout the country and close to 5000 national and chapter members. The organization lobbies to change laws in order to protect former spouses of service members. EX-POSE also produces and disseminates educational material, including a newsletter and a booklet entitled *The Guide for Military Wives Facing Separation and Divorce.*

NATIONAL ACTION FOR FORMER MILITARY WIVES

National Action For Former Military Wives is a non-profit organization with approximately 5000 members. Since 1979, it has worked to obtain passage of federal legislation to provide improved benefits for former military wives.

NATIONAL ORGANIZATION FOR WOMEN

The National Organization for Women (NOW) was founded in 1966. It has a paid membership of 150 thousand and is one of the largest women's rights organizations in the country. NOW acts through political, educational and legal means to achieve fair treatment for women in marriage and divorce particularly in the area of equitable divisions of marital assets of which the pension of the wage earner is often the largest and most important part.

NOW LEGAL DEFENSE AND EDUCATION FUND

The NOW Legal Defense and Education Fund (NOW-LDEF) is a not-for-profit civil rights organization that performs a broad range of legal services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW-LDEF was founded in 1970 by leaders of the National Organization for Women, a membership organization of over 160,000 women and men in more than 725 chapters throughout the country. Family law, and in particular the economic rights of women in the family sphere, are a major focus of NOW-LDEF's work. The organization has filed *Amicus Curiae* briefs on family law issues, including distribution of property at divorce in courts. Cases in which NOW-LDEF has filed *Amicus Curiae* briefs before this Court include *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) and *McCarty v. McCarty*, 453 U.S. 210 (1981).

OLDER WOMEN'S LEAGUE

The Older Women's League (OWL) was founded in 1980 to address the concerns of older women. Presently, OWL has over 20,000 members and donors, and over 100 chapters in 36 states, including the Sacramento Capitol Chapter which is especially concerned about the issues herein due to the large numbers of elderly military ex-spouses in California. High poverty rates among older women are a primary concern of OWL members; women's lack of access to pension benefits—due in part to absences from the workforce for family responsibilities and also to women's concentration in lower-paying jobs—play a key role in perpetuating the economic impoverishment and dependency of this growing segment of the population.

PENSION RIGHTS CENTER

The Pension Rights Center is a non-profit public interest group that educates the public about pension issues and represents the pension rights of workers, retirees, and their families. The Pension Rights Center conducts a Women's Pension Project that has successfully promoted federal legislation on behalf of former spouses after divorce.

WOMEN'S EQUITY ACTION LEAGUE

Women's Equity Action League (WEAL) is a non-profit, membership organization that specializes in women's economic issues. WEAL conducts research and education projects, supports litigation, and lobbies on these issues. WEAL has worked for years to secure pension equity for women, and has a special commitment, through our Project on Women and the Military, to the special problems of military spouses and former spouses.

WEAL played a significant role in the passage of the Federal Uniformed Services Former Spouses' Protection Act in 1982 and in the subsequent modifications that have helped to secure pension and other benefits for the former spouses of military personnel.

WOMEN'S LEGAL DEFENSE FUND

Founded in 1971, the Women's Legal Defense Fund (WLDF) is a non-profit membership organization whose purpose is to challenge sex discrimination through legal action. In addition to litigation in selected cases and advocacy before the executive and legislative branches, WLDF provides direct services in the form of information about their legal rights to over 6000 women each year. The vast majority of these women contact WLDF with problems relating to domestic relations, in particular the lack of adequate financial resources as a result of marital dissolution.

AMICUS CURIAE

BRIEF

MOTION FILED
SEP 13 1988

(10)

NO. 87-201

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

GERALD E. MANSELL, Appellant

vs.

GAYE M. (MANSELL) FORBES

ON APPEAL FROM THE COURT OF APPEAL
OF CALIFORNIA,
FIFTH APPELLATE DISTRICT

BRIEF FOR AMERICAN RETIREES ASSOCIATION AS AMICUS CURIAE

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20 pp

NO. 87-201

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

GERALD E. MANSELL, Appellant

vs.

GAYE M. (MANSELL) FORBES

REQUEST FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF ON BEHALF OF APPELLANT

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On June 21, 1988, I contacted DENNIS CORNELL, counsel for MRS. MANSELL. He declined to consent to the filing of an amicus brief herein on behalf of GERALD MANSELL.

Loretta H. Hellen

LORETTA H. HELLEN
Attorney at Law

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 36 of the Supreme Court Rules, American Retirees Association respectfully seeks permission from this Honorable Court to file an amicus curiae brief in support of the Appellant Gerald E. Mansell, on the issue of whether or not disability pay of the military member can be divided as a community property asset upon dissolution of marriage.

Applicant is a non-profit organization dedicated to the obtaining of information and protecting of benefits to which the military members become entitled as a result of their contract for indefinite services with the United States Armed Forces.

Applicant is familiar with the issues involved in this appeal and has sponsored

litigation within the State court of California to bring this issue to the attention of the United States Supreme Court. Applicant has retained legal counsel and she has prepared the attached brief which applicant seeks approval from this Court for filing herein.

Applicant raises the unanswered question in McCarty -- namely, can California courts abandon the characterization of the pay as current pay for current services and RECHARACTERIZE the pay as deferred compensation. Only deferred compensation is a divisible asset upon dissolution in California; the current and future earnings of any party are the sole and separate property of the earning party and not divisble upon dissolution of marriage. As this Court pointed out in McCarty, it is a federal issue to determine whether or not

California's recharacterization of the pay interferes substantially with the federal statutory schema. Applicant respectfully contends that such recharacterization not only interferes with but totally destroys the federal statutory schema.

California courts' recharacterization runs directly afoul of over 100 years of case law precedent of this Court and other federal courts. California courts continue to refuse to apply the Doctrine of Stare Decisis and continue to ignore case law precedent of this Court and federal statutory schema and law.

In view of the importance of determining the Supremacy of the laws of the United States and the authority granted exclusively to Congress to raise and maintain armies when in conflict with domestic relations of individuals in this particular State, it is in this Court's

interest to obtain the fullest possible briefing to ensure that the Court has a complete understanding of the issues and facts before deciding whether to grant a hearing in this case.

Accordingly, applicant, American Retirees Association, respectfully requests leave to file the amicus brief attached hereto in support of Appellant's position.

Dated: June 23, 1986

Allen L. Morrison

AL MORRISON, PRESIDENT

AMERICAN RETIREES

ASSOCIATION

STATEMENT OF INTEREST

American Retirees Association is a non-profit organization designed to assist military members in obtaining information of benefits and in protecting benefits from adverse litigation, judgments or legislation.

ARGUMENTS

Essentially, four reasons prohibit the division of disability pay.

1. DISABILITY PAY IS SPECIFICALLY EXCLUDED FROM THE FORMER SPOUSES PROTECTION ACT (10 U.S.C. 1408(a)(4).

The Former Spouses Protection Act (hereinafter referred to as "Act") specifically delegates to the States the authority to treat net disposable pay in accordance with the laws of the State [10 U.S.C. 1408(c)(1)]; net pay is defined as exclusive of disability pay [10 U.S.C. 1408 (a)(4)]. Thus, Congress did not

intend for the States to exercise any jurisdiction over disability pay, McCarty v. McCarty (1981) 453 U.S. 210 (superceded by the Act in other respects).

2. THE ACT IS UNCONSTITUTIONAL.

The United States Constitution, Article I, Section 8, Cls. 12-16 specifically enumerates and delegates to Congress alone the power and authority to regulate the pay for military service and to determine what constitutes military service for which compensation is required or payable [United States v. Standard Oil (1947) 332 U.S. 301 (holding personnel affairs/pay subject exclusively to U.S. regulations); Free v. Bland (1962) 369 U.S. 663 (holding that federal law and congressional enactments control the characterization of retired pay as present earnings); United States v. Tarble (1872) 80 U.S. 397.

Now, among the powers assigned

to the National Government, is the power "to raise and support armies" and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive... No interference with the execution of this power the National Government in the formation, organization and government of its armies by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of public service, United States v. Tarble, supra, at page 408, cited with approval in McCarty v. McCarty, supra, 453 U.S. at 232-234.

Congress may not delegate its authority granted to it exclusively by the United States Constitution to the States, Knickerbocker Ice Company v. Stewart (1920) 253 U.S. 149 (holding that delegation of injured seaman's remedies to state laws is unconstitutional). Since the United States Constitution expressly grants to Congress exclusive authority in

the area of military affairs, the delegation by the Act of any portion of Congressional authority to the State courts is unconstitutional.

3. IF THE ACT IS CONSTITUTIONAL AND DISABILITY PAY IS INCLUDED, CALIFORNIA IS PREEMPTED FROM RECHARACTERIZING PAY AS PENSION AND IS, THEREFORE, PRECLUDED BY STATE LAW FROM DIVIDING THE PAY.

The federal designation of the pay as current earnings has persisted for over 100 years, United States v. Tyler (1881) 105 U.S. 243; Costello v. United States (9th Cir. 1978) 587 F. 2d 424, cert. den. 442 U.S. 929 (1979). The funds are a yearly appropriation by Congress (United States v. Larionoff (1977) 431 U.S. 864) in consideration for the military member's continuing services, availability for recall and observance of restrictions on his fundamental rights of employment and

travel. 1/

The pay is, therefore, continuing pay for continuing services pursuant to the

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1/ United States v. Morton (1884) 112 U.S. 1; United States v. Mills (1904) 197 U.S. 223; Kahn v. Anderson (1920) 255 U.S. 1; Leonard v. United States (1928) 279 U.S. 40; Puglisi v. United States (Ct. Cl. 1977) 564 F. 2d 703; Andrews v. United States (1966) 175 Ct. Cl. 561; Chambers v. Russell (N.D. Cal. 1961) 192 F. Supp. 425; Hooper v. Hartman (S.D. Cal. 1958) 163 F. Supp. 437, aff'd 274 F. 2d 429 (9th Cir., 1959) (Rear Admiral trial by court martial for charges arising post retirement and, when found guilty, forfeited contract for indefinite services and the right to earn military retired pay); Watson v. Watson 424 F. Supp. 886 (1976); Hostinsky v. United States (1961) 292 F. 2d 508, 154 Ct. Cl. 443 (forfeitrue of pay upon employment subject to "supervision and control" of foreign gov't and prohibiting dual officer status/pay).

Other restrictions include the following: (a) reductions in pay if certain employment accepted (5 U.S.C. 5532); (b) forfeiture of pay for certain crimes (5 U.S.C. 8312); (c) forfeiture if employment by foreign gov't (U.S. Const. Art. I, Sec. 9, Cl. 8); (d) forfeiture of pay for employment with defense work for private firms within 3 years of retirement (27 U.S.C. 801); (e) recall involuntarily; (f) forfeiture if foreign citizenship is acquired (37 Comp. Gen. 207; 41 Comp.Gen. 715; (f) subject to UCMJ.

employment contract for indefinite services entered into by and between the military member and the United States Armed Forces when the member was on active duty. As the United States Court of Appeals for the Ninth Circuit noted in Costello (and Stevens) v. United States, supra, "...the contract seems to mean that Stevens will receive the pay authorized by statute from time to time as he performs his service."

The soldier's entitlement to pay is dependent upon a federal statutory right, Bell v. United States (1961) 366 U.S. 393; Goodley v. United States 441 F. 2d 1175 and is payable and paid to the soldier as a personal entitlement, McCarty v. McCarty, supra, 453 U.S. 210. It is pay earned upon a daily basis, Watson v. Watson, supra, 424 F. Supp. 866; no port.on of the pay is in consideration for

past services rendered by the member, Costello v. United States, supra.

In 1974, the California Supreme Court decided that military retired pay was deferred compensation and not current compensation, In re Marriage of Fithian (1974) 10 Cal. 3d 592. This decision violates the Rule of Stare Decisis, Auto Equity Sales v. Superior Court (1962) 57 Cal. 2d 450:

> Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a highest court, Auto Equity Sales v. Superior Court, supra, page 455.

Furthermore, the decision violates the United States Constitution, Article VI(2), binding all judges of every State to uphold the Constitution and the Laws of the United States which shall be made in pursuance thereof.

Moreover, the State court is preempted from REcharacterizing the pay as deferred compensation; in every case where the state and federal law conflicts and the State's interpretation would be irreparable injury to the federal statutory schema, the state law must yield, Wissner v. Wissner (1950) 338 U.S. 655; Ridgway v. Ridgway (1981) 454 U.S. 46; Rohr Aircraft Corp. v. County of San Diego (1959) 51 Cal. 2d 759 (all holding that State may interpret federal statute, but State bound by federal characterizations and definitions).

State courts will be preempted upon a showing of (1) an expression of Congressional purpose or intent to preempt the field, (2) pervasiveness of the schema, (3) nature of the field as federal in character, and (4) inherent need for nationwide uniformity. By delegation of

authority by the United States Constitution (Article I, Section 8, Cls. 12, 13, 14, and 18), the raising of standing armies is strictly a federal matter and nothing is more federal in character than this, United States v. Tarble, supra, 80 U.S. 397. Since Congress maintains that national security depends upon the success of the statutory schema and the imposition of control over the military member's conduct, employment and travel after separation from active duty (Costello v. United States, supra), the uniformity is a critical aspect of the schema. Consequently, the State courts are preempted from recharacterizing the pay as deferred compensation, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Rice v. Santa Fe Elevator Corp. 331 U.S. 219 (1947).

Thus, even if California courts were

not bound to follow case law precedents of the United States Supreme Court and not bound to apply federal law pursuant to the United States Const. Art. VI (2), California courts are preempted from recharacterizing the pay as deferred compensation.

The characterization of military retired/retainer pay is critical to the question of the divisibilty of disability pay. Under California law, disability pay is divisible upon divorce/legal separation ONLY to the extent that the military member gives UP a COMMUNITY PROPERTY ASSET in order to receive the disability pay. Specifically, the California Supreme Court in 1981, In re Marriage of Milhan (27 Cal. 3d 765) ruled that the retainer pay is deferred compensation; therefore, the retainer pay is a divisble asset. This premise has been rejected for centuries by this Court and other federal courts,

supra. However, the California Supreme Court held that where the military member elects to receive disability pay in lieu of retainer pay, then he effectively deprives his former wife of her property interest in the retainer pay; therefore, to the extent that the disability pay REPLACES AN ASSET IN WHICH THE FORMER SPOUSE has a property interest, the California court permits the invasion and division of the disability pay to recapture the loss to the former wife of her property interest in the retainer pay.

The fallacy of this argument is transparent. Given the federal characterization of the pay as current earnings, the pay is NOT a divisible asset upon divorce/legal separation under the exist-

ing laws of this State. 2/

If and only if the State may change the character of the pay from the

2/ California Family Law Act (1970) California Civil Code §§4000 et seq; California Rules of Court, Special Proceedings (Rules 1212); Lang v. Superior Court, 153 C.A. 3d 510; California Civil Code 4351 (providing jurisdiction over the property rights of the parties); California Civil Code § 4363.3 (providing jurisdiction over deferred compensation benefits); In re Marriage of Brown (1976) 15 Cal. 3d. 838, 845 (holding that the characterization of funds as "pension" hinges upon proof that those funds "are properly part of the consideration earned by the employee" during marriage and on active duty, citing In re Marriage of Fithian, supra, 10 Cal. 3.d 592 at 596); Johnson v. Johnson (1963) 214 C.A. 2d 29 (holding that future earnings of a party are not subject to division or jurisdiction of the domestic relations court); Tilghman v. Superior Court (1974) 238 C.A. 2d 398 (no jurisdiction over future earnings); Mitchell v. Mitchell 238 C.A. 2d 398 (holding no jurisdiction over future earnings); In re Marriage of Wicks (1978) 80 C.A. 3d 329 (holding that incentive pay, though an entitlement earned during marriage, is separate property where services rendered after separation); California Civil Code &5118 (future earnings of a party are the separate property of the earning party after separation).

federal statutory schema's clear and necessary intent of being current pay for current services to a deferred compensation benefit will either disability or retainer pay be divisible under California law.

In 1979 the Court of Appeal for California, In re Marriage of Orr (95 C.A. 3d 561), ruled that the Veteran's disability pay was the separate property of the payee, Hisquierdo v. Hisquierdo (1979) 439 U.S. 572 (holding that the State was preempted from division of the pay). This was overruled by the California Supreme Court in 1980, In re Marriage of Milhan, supra, and again in Casas v. Thompson (1986) 42 Cal. 3d 131.

The controlling issue herein is the unanswered question in McCarty; in deciding McCarty on other grounds, the United States Supreme Court declared:

> Having said all this, we need not decide today whether federal law prohibits a State from characterizing retired pay as deferred compensation, McCarty v. McCarty, supra, 453 U.S. 210, 69 L. Ed. 2d 600.

Now the time is ripe to address and answer this question. Clearly, the ability of the United States Armed Forces to continue to impose restrictions and obligations and regulations upon a "retired" member depends upon the retention of the characterization of the pay as present earnings, Costello v. United States, supra.

If the security of this Nation depends upon the military standing ready, than obviously the characterization of the pay as earnings must be retained. If the security of this Nation would not be in jeopardy if a retiring officer with classified information undertook employment with the Soviet Union, then obviously it is acceptable to recharacterize the pay

as deferred compensation and RELEASE EACH AND EVERY "RETIRED" MILITARY MEMBER from the Congressionally imposed restrictions, obligations and regulations.

The characterizations cannot co-exist; the pay cannot be earnings in order to maintain a proper and adequate standing army and protect national security AND deferred compensation.

4. ANY AWARD OF A PROPERTY INTEREST IN A VETERAN'S PAY WOULD VIOLATE THE CONTRACT CLAUSE.

Lastly, the military member has a written contract for indefinite services with the United States Armed Forces; his payment of military retired pay are a personal entitlement, United States v. Tyler, supra, 105 U.S. 243; McCarty v. McCarty, supra, 453 U.S. 210.

The pay is taxable as ordinary income on a W-2 form, United States v. Williams

(1977) 370 A.F.2d 1135.

The pay is protected from assignments, creditor's claims and other attachments (except for child and spousal support) by federal statute to ensure that the military member receives just compensation for his continuing obligations to the United States Armed Forces, 37 U.S.C. 701(c)(1); 10 U.S.C. 2271; 10 U.S.C. 2272; 15 U.S.C. 5221.

As Court of Appeals for the United States, Ninth Circuit, observed in Costello v. United States, supra, the argument that retired pay is deferred compensation "...proceeds upon the premise that with military retirement all compensible service owing to the government ceases. This has been established as a false premise since at least 1881..." The member is entitled to just compensation, fixed in amount by Congress each year in

its military budget appropriations; this compensation is a personal entitlement and is the current earnings of the military member, who never resigns his commission or rank. His contract with the United States Armed Forces is written and codified in the federal statutes.

Any award of a "property" interest in the future earnings of a military member ensures that the member does not receive his full compensation due to him personally for current services rendered. Therefore, any award by a State court or State law of any portion of the member's pay to a former spouse as a property interest in the member's future pay violates the Contract Clause of the United States Constitution, Article 1, Section 10.

CONCLUSION

For the foregoing reasons, amicus curae respectfully requests that this

Court find as follows:

1. Military retired pay is a personal entitlement of the military member;

2. Military retired pay is paid to the military member pursuant to the terms and conditions of his contract for indefinite services to the United States Armed Forces and constitutes continuing pay for continuing services;

3. Disability pay is received in lieu of military retired pay;

4. Disability pay is characterized as pay received pursuant to a contract for indefinite services;

5. Neither disability pay nor military retired pay is paid to any military member for past services rendered to the United States Armed Forces;

6. California is preempted from characterizing either disability pay or military retired pay/retainer pay as

deferred compensation or pension benefit;

7. No person, including the military member, acquires a property interest in future pay to be yet earned by the military member; and

8. California is preempted from dividing the military retired pay/ retainer pay or disability pay as community property upon dissolution of marriage.

Dated: August 15, 1988

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